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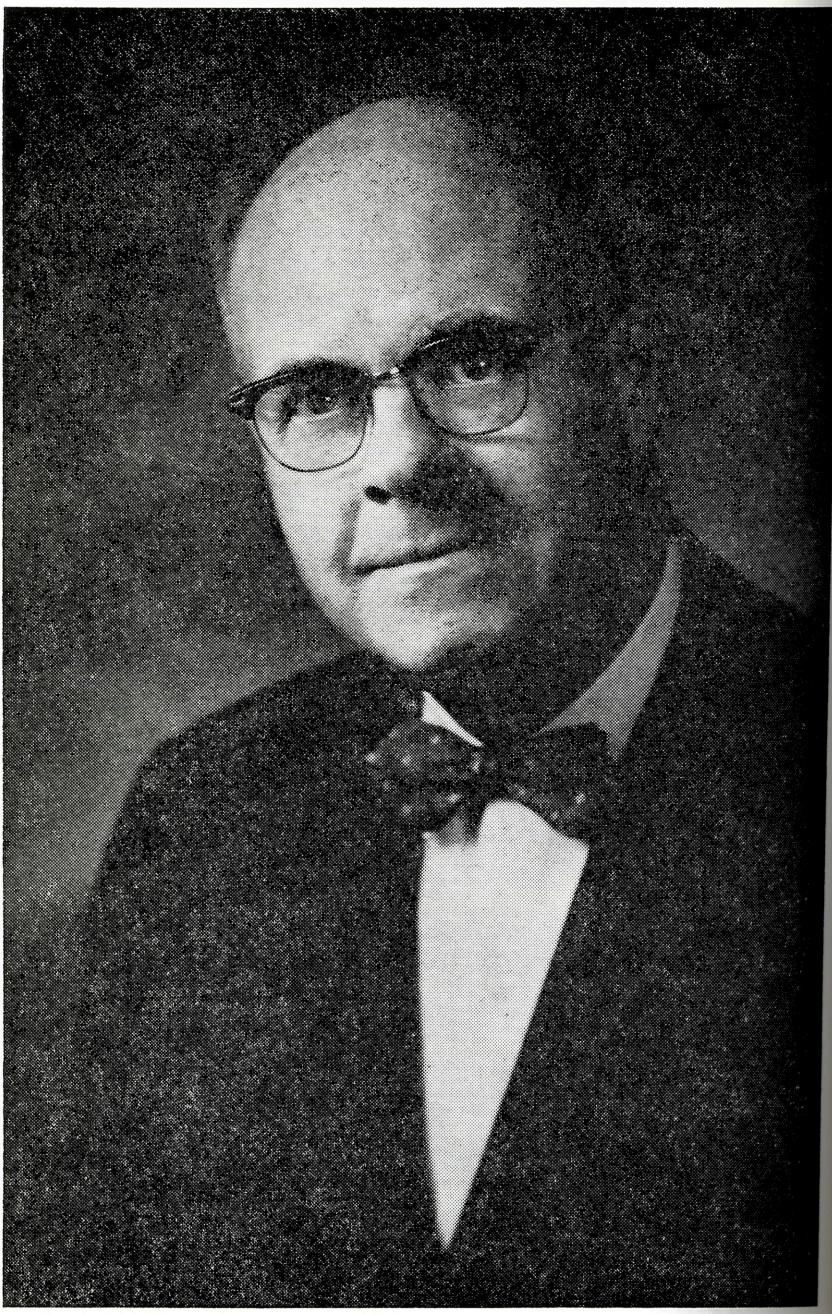

VANCE R. DITTMAN, JR.

DENVER LAW JOURNAL

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VANCE R. DITTMAN, JR.— A LAWYER'S LAW PROFESSOR

BY THOMPSON G. MARSH*

IN a day when it was believed that law students should be taught by well-educated lawyers who had had years of successful law practice, Vance R. Dittman came to what was then the Denver Law School with the best possible qualifications: A.B., Yale, LL.B., Yale, several years of really successful and first class practice in New York and Denver, and an independent income which made it possible for him and his wife (also of Yale) freely to choose an academic life.

It happened to be at that brief period when the law school was in the center of the university campus at University Park, an attractive residential community six miles from the courts and law offices of downtown Denver that the Dittmans bought a home there in the shadows of the ivory towers and the prospect was pleasant.

Within two years, Vance was in the Navy, and when the war was over he still had his home in University Park, but the law school was back downtown, where it had been for half a century, and where it is now — near the courts and law offices.

In spite of this, the Dittmans developed in University Park and on the university campus broader and more intimate friendships than were enjoyed by other members of the faculty. Mrs. Dittman was President of the Women's Faculty Club, and Vance was President of the University Senate. He was so well educated and well informed on everything from literature to science and he had so many friends in so many different fields of learning, that in his person he was able to achieve to an unusual extent, that interdisciplinary synthesis of which so much has been written.

Withal, he remained a lawyer's law professor. He taught contracts and evidence and civil procedure with teaching loads that in the early years ranged from 15 to 20 hours per week, and yet, with the habit of a good lawyer, he complemented the casebooks with annotations and citations that practically constituted briefs. His

*Professor of Law, University of Denver, College of Law.

students learned not only contracts, evidence, and civil procedure but also thoroughness and accuracy, which might be considered among the sine qua non of professional responsibility. Furthermore, he singlehandedly administered a program by which students were given academic credit for actual practice, under a special rule of the Supreme Court of Colorado. His supervision was close and exacting and the standards he set must have helped many of the school's graduates to set similarly high standards for themselves.

When teaching loads were diminished, Vance seemed to work harder than ever. He prepared his own materials for new courses in Civil Procedure; he collaborated with Harold Hurst in the preparation of a book on procedural due process in which every relevant discussion of the Supreme Court of the United States was considered; and he prepared a manual for use by the Denver Police Department when law enforcement officials first began to be aware of questions concerning the legality of their own procedures.

Recognition of him as Colorado's outstanding authority on civil procedure caused the West Publishing Company to request him to prepare a three-volume work on the *Colorado Rules of Civil Procedure.* With typical thoroughness, he refused to rely upon the digests, but instead, with the help of a student assistant, turned every page of the *Colorado Reports.* No case was overlooked. Nor was he content merely to express his own first opinion with respect to unclear and ambiguous language in the rules or in the opinions construing the rules. In such cases he would argue it out with some other member of the faculty who might have a different point of view. He even prepared the index for the *Colorado Rules of Procedure.* In order to meet the contract deadlines he worked early and late at the law school and even during the summers at his mountain home, Sky Meadow.

No wonder he is now retiring, years before the age limit. He has earned freedom, and again he is in a position to choose the life he wants.

CIVIL RIGHTS IN COLORADO

BY J. DAVID PENWELL*

In recent years there has been a heightened interest in the field of civil rights. The impact has been especially significant on the legal profession; nevertheless, many lawyers have limited working knowledge in this important field in that they are unfamiliar with the practices and procedures of the civil rights commissions and are unaware of the full ramifications of current civil rights legislation. In this timely and well documented article, Mr. Penwell examines civil rights law in Colorado. He discusses the development as well as the present state of Colorado law relating to the Public Accommodations Act, the Fair Employment Act, and the Fair Housing Act. He also compares Colorado law with federal civil rights law and with that of other states. Furthermore, he explains how the Colorado Civil Rights Commission administers the law and the procedures established by the commission for handling a civil rights case. Finally, Mr. Penwell notes the shortcomings of the existing civil rights laws and gives suggestions for their improvement.

INTRODUCTION

COLORADO has had a long, if perhaps sometimes undistinguished, history in civil rights. It is only in the last 10 years or so, however, that there has been any legal significance attached to this subject. It is presently receiving a great deal of attention and the purpose of this article is to explain the civil rights laws presently existing in Colorado.

Except for the larger employers, few clients of an attorney will have had much experience or contact with the Colorado Civil Rights Commission, the agency administering the state's civil rights laws. For this reason the number of lawyers who are familiar with the commission and its statutes is relatively small. However, the professional tools needed for civil rights cases are neither involved nor difficult, and it is hoped that the information contained in this article will save the attorney a certain amount of time in appraising and understanding a civil rights case if he should receive one.

Colorado presently has three civil rights statutes: a public accommodations act,[1] a fair employment act,[2] and a fair housing act.[3] As with most regulatory and enforcement statutes, there are other

*Assistant Secretary and Counsel for the Golden Cycle Corporation, Colorado Springs, Colorado. B.S. University of Montana, 1955; L.L.B. University of Colorado, 1962. Former Assistant Attorney General, State of Colorado and Legal Counsel — Colorado Civil Rights Commission.

[1] COLO. REV. STAT. ANN. §§ 25-1-1 *et seq.* (1963).

[2] *Id.* §§ 80-21-1 *et seq.*

[3] *Id.* §§ 69-7-1 *et seq., as amended* (Supp. 1965).

limitations, prohibitions, and restrictions relating to civil rights to be found in other laws. With one exception,[4] however, these other laws exist and operate outside of the statutory jurisdiction of the Colorado Civil Rights Commission. This article will be limited, therefore, to a consideration of the three major laws administered by the commission and the procedures followed in carrying out its duties.

I. PUBLIC ACCOMMODATIONS LAWS

Early in Colorado's history a civil rights policy was built into the structure of the law. The Enabling Act laying the foundation for the adoption of a constitution, the creation of a state, and its admission to the Union provided that "the constitution should be republican in form, and shall make no distinction in civil or political rights on account of race or color . . . [and] that perfect toleration of religious sentiment shall be secured and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. . . ."[5] These requirements were later incorporated in various forms into the Colorado Constitution.[6]

In 1885, only five years after the adoption of the constitution, the general assembly passed its first civil rights law — a public accommodations act.[7] This law remained unchanged until 1895 when the initial act was repealed and reenacted in its present form.[8] The 1895 law was substantially the same as the one it replaced, except that the later statute deleted churches as places of public accommodation. To the possibility of incurring a fine of $300.00 upon being convicted for a misdemeanor,[9] the 1895 law also added

[4] The Proprietary School Act of 1966, *id.* § 146-3-5(1) (Supp. 1967), gives the Colorado Civil Rights Commission authority to investigate discriminatory practices in proprietary schools and report the same to the State Board for Community Colleges and Occupational Education. Most of the other civil rights laws involve a general prohibition against discrimination (*e.g.*, "There shall be no discrimination shown toward any teacher in the assignment or transfer of that teacher to a school, position, or grade because of sex, race, creed, color, or membership or nonmembership in any group or organization." COLO. REV. STAT. ANN. § 123-18-14(1). But such laws do not provide for any penalties or enforcement measures in the event of a violation and are, therefore, in practical effect merely statements of policy.

Other such laws not pertaining to matters under the commission's jurisdiction (such as COLO. REV. STAT. ANN. § 80-11-61 (1963) — discrimination in discharging an employee because of his age) declare that a violation constitutes a misdemeanor, but offer no affirmative relief to the aggrieved person. Even if a complaint is filed under the statute, it is never prosecuted because of the different and heavier burden of proof for a criminal case.

[5] Colo. Enabling Act §4, COLO. REV. STAT. ANN. Vol. 1 (1963).

[6] COLO. CONST. art. II, §§ 1-28 (the Bill of Rights), with specific reference to Section 4 on religious freedom and Section 25 on due process; *see also* Article IX, Section 8, prohibiting discrimination in public education.

[7] Colo. Sess. Laws of 1885, at 132.

[8] Colo. Sess. Laws of 1895, Ch. 61, at 139.

[9] *Id.* § 2.

a private remedy. An aggrieved person could file a private civil action, with damages of up to $500.00 for each offense.[10] The complainant was required to elect his remedies, and could not pursue more than one cause of action.[11]

As with many Colorado statutes, this law was taken from an Illinois law,[12] which, in this case, had been copied from the Federal Civil Rights Act of 1875.[13] The federal law was in substantially the same form as that subsequently adopted in Colorado and prohibited discrimination in the denial of the "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."[14] Colorado's law reads exactly the same except that it also includes restaurants, eating houses, and barber shops and ends with "all" other places of public accommodation.[15]

Various states passed such laws in response to the decision of the United States Supreme Court in *Civil Rights Cases*.[16] This decision, consolidating several lower court decisions on the same subject, held that the Federal Civil Rights Act of 1875 was unconstitutional. The Court held that Congress was legislating in areas reserved for state action by the 13th and 14th amendments to the United States Constitution. The effect of these state laws was, for the most part, annulled by the 1896 decision of the Supreme Court in *Plessy v. Ferguson*,[17] which articulated the "separate but equal" doctrine. With the end of the Reconstruction Period, resulting from the election of President Hayes in 1877, and the *Plessy* decision, civil rights was retired as a legal concept for many years to come.

By 1964, 30 states in addition to Colorado had public accommodation laws, most of which are similar to Colorado's statute and most of which were passed in the period between 1880 and 1900.[18] Of these 30, 13 have been considered by their respective state supreme courts and have been held to be constitutional.[19] In Colorado the

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[10] *Id.*

[11] *Id.*

[12] COTHRON'S ANN. STATUTES, Ill. 449 (1887).

[13] Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.

[14] *Id.* § 1.

[15] COLO. REV. STAT. ANN. § 25-1-1 (1963).

[16] 109 U.S. 3 (1883).

[17] 163 U.S. 537 (1896).

[18] Bell v. Maryland, 378 U.S. 226, 284 (Appendix V) (1964).

[19] Annot., 49 A.L.R. 505 (1927); *see also* School Committee of Boston v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967).

basic statute has been before the state supreme court six times.[20] Four of these decisions were decided on procedural grounds,[21] but in *Crosswaith v. Bergin,* the court specifically found the law to be constitutional.[22]

The case of *Darius v. Apostolos*[23] is particularly significant. The issue was whether a bootblack stand was a place of public accommodation since it was not specifically mentioned in the statute. The court reversed the trial judge's decision and held that a bootblack stand was included and was covered by the act. The court ruled that the principle of *ejusdem generis* did not apply in the interpretation of this statute and that the phrase "all other places of public accommodation" was not limited to other places similar or related to those places or establishments specifically mentioned earlier in the statute, *i.e.,* inns, restaurants, eating houses, barber shops, public conveyances, and theaters, and that the phrase "all other places" means exactly what it says.[24] It was on the strength of this case and Article IX, Section 8 of the Colorado Constitution that the Colorado Civil Rights Commission in 1967 issued a policy statement that public schools are places of public accommodation in Colorado and that the commission would therefore assume jurisdiction over cases of *de facto* segregation in Colorado public schools.[25]

When the legislature passed the Anti-Discrimination Act of 1957,[26] Colorado's civil rights employment law, the public accommodations law was amended to bring the enforcement of public accommodations discrimination under the jurisdiction of the Civil Rights Commission,[27] providing a third remedy to an aggrieved person in addition to the civil action and misdemeanor prosecution already available. The law also continued the requirement that a complainant elect his remedies so that a choice of any one procedure would be

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[20] Jernigan v. Lakeside Park Co., 136 Colo. 141, 314 P.2d 693 (1957); Johnson v. Westland Theatres, Inc., 117 Colo. 346, 187 P.2d 932 (1947); Lueras v. Town of Lafayette, 100 Colo. 124, 65 P.2d 1431 (1937); State *ex rel.* McKinney v. Lowry, 100 Colo. 144, 66 P.2d 334 (1937); Crosswaith v. Bergin, 95 Colo. 241, 35 P.2d 848 (1934); Darius v. Apostolos, 68 Colo. 323, 190 P. 510 (1920).

[21] Jernigan v. Lakeside Park Co., 136 Colo. 141, 314 P.2d 693 (1957); Johnson v. Westland Theatres, Inc., 117 Colo. 346, 187 P.2d 932 (1947); Lueras v. Town of Lafayette, 100 Colo. 124, 65 P.2d 1431 (1937); State *ex rel.* McKinney v. Lowry, 100 Colo. 144, 66 P.2d 334 (1937).

[22] 95 Colo. 241, 35 P.2d 848 (1934), wherein the court cited Darius v. Apostolos, 68 Colo. 323, 190 P. 510 (1920) for the proposition that the statute had been held constitutional; however this issue was not discussed in the *Darius* case.

[23] 68 Colo. 323, 190 P. 510 (1920).

[24] *Id.* at 327, 190 P. at 511.

[25] Policy Statement, Colorado Civil Rights Commission, Minutes of Commission Meeting, Dec. 22, 1967.

[26] COLO. REV. STAT. ANN. §§ 80-21-1 *et seq.* (1963).

[27] *Id.* §§ 25-3-3, 80-21-5 (1963). The Colorado Anti-Discrimination Commission referred to in this statute has been redesignated the Colorado Civil Rights Commission. COLO. REV. STAT. ANN. §§ 25-3-3, 80-21-5 (Supp. 1965).

a bar to any alternate action.[28] Under this amendment, the only relief the commission can grant is to issue cease and desist orders prohibiting further discriminatory conduct. If such an order were not obeyed, it would be enforceable in the district court through the district court's contempt powers.[29] As with other laws administered by the commission, such an administrative order can only be issued after an administrative hearing in which the complainant has proved a statutory violation,[30] unless the case was disposed of before a hearing through the conciliation powers of the commission to settle cases by agreement of the parties.[31]

The most unique portion of the amended public accommodations law is in the prohibition section setting forth the conduct forbidden. No reference is made to the familiar words "race, creed, color, national origin or ancestry;" the law instead refers to: "*All persons . . .* shall be entitled to the . . . equal use of places of public accomodation."[32] This would appear to be an admonition against any type of deferential conduct by a proprietor. The statute ends this particular provision with the phrase, "Subject only to the conditions and limitations established by law and applicable alike to all citizens."[33] For example, apparently the owner of a bar could, under this law, refuse to serve all drunks or those who appeared intoxicated or who were causing a disturbance; but he could not be selective and only throw out those against whom he had a particular aversion. If there is a policy therefore, it must be applied equally to all.

Under this provision, therefore, the posting of the signs frequently seen in places of public accommodation stating that "we reserve the right to refuse service to anyone" is highly questionable and probably unlawful. If a proprietor attempted to exercise this privilege he might find it necessary to show that he does so under the "conditions and limitations established by law and applicable alike to all citizens."[34] If the aggrieved person could submit any evidence showing that the proprietor's standards for such action did not meet the statutory test and were in any way arbitrary, and this evidence could not be rebutted by the proprietor, the complainant would be able to prove a statutory violation.

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[28] COLO. REV. STAT. ANN. § 25-3-1 (1963).

[29] *Id.* §§ 25-3-5, 80-21-8.

[30] *Id.* §§ 25-3-4, 80-21-7.

[31] *Id.* §§ 25-3-4, 80-21-7(3). The conciliation procedure is reviewed *infra* in this article.

[32] *Id.* § 25-1-1 (Supp. 1969) (emphasis added).

[33] *Id.*

[34] *Id.* In this regard, the commission has promulgated General Regulation No. 4 which states that: "No person shall post, or permit to be posted in any place of public accommodation any sign which states or implies the following: 'We reserve the right to refuse service to anyone.'" LAWS, RULES AND REGULATIONS OF THE COLORADO CIVIL RIGHTS COMMISSION 36 (1968).

This law is a classic example of the uselessness of providing a criminal penalty for a civil rights violation. The author has not been able to find a single example of this law being enforced by a prosecutor in the 93 years of its existence. A district attorney just will not prosecute this kind of case for the very good reason that the burden of proving his case beyond a reasonable doubt is practically insurmountable.[35] The commission appreciates how difficult such prosecution would be from its own experience in hearing cases and from trying to determine if the complainant has proven his case under the easier test of proving a discriminatory act by a preponderence of the evidence.

Since 1957, when the commission was given the authority to administer this law, few private civil actions have been initiated, as most of the cases that do arise are filed with the commission. Fortunately, most respondents do not wish to engage in what could be a lengthy and costly proceeding and most public accommodations cases are conciliated amicably. This is really the best solution for all concerned, for even if the commission is finally forced to hold a hearing, the most it has the authority to do is issue a cease and desist order. Therefore, it is suggested that if a respondent refused to conciliate and the matter was taken to a hearing and the finding was against the respondent, the commission should have the authority to assess damages against the respondent for the complainant, especially since, as the law now reads, the complainant has given up any form of monetary relief in initially filing his case with the commission.[36]

II. FAIR EMPLOYMENT LAWS

Colorado's civil rights law relating to employment is the Anti-Discrimination Act of 1957.[37] A 1965 amendment to this statute created the Civil Rights Commission as it is presently constituted.[38] As with most civil rights employment laws of other states, Colorado's law was copied from a 1945 New York statute,[39] which was the first to adopt a commission approach to the administration and enforcement of civil rights.[40]

The structure of the New York commission and statute has since been more or less adopted by the other states who have legis-

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[35] *See* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 19-20 (1966). Mr. Sovern touches on the nature of such laws, and comes to a similar conclusion.

[36] COLO. REV. STAT. ANN. § 25-3-1 (Supp. 1965).

[37] *Id.* §§ 80-21-1 *et seq.* (1963).

[38] *Id.* §§ 80-21-2 *et seq.* (Supp. 1965).

[39] N.Y. Sess. Laws of 1945, ch. 118, §§ 1-3.

[40] SOVERN, *supra* note 35, at 19.

lated in this area.[41] At the present time only 13 states do not have fair employment laws.[42] Except for two curious exceptions, North and South Dakota, all of these states are from what might be considered the Deep South. Of the 37 states having fair employment laws — together with the District of Columbia and Puerto Rico — 33 administer and enforce the laws through commissions, boards, or departments similar to the Colorado commission.[43] The remaining states merely have statutory prohibitions against discrimination in employment, with either no provision for a remedy or with only the provision that such discrimination be treated as a misdemeanor,[44] considered to be of little or no value.

Colorado's law covers all employers in the State of Colorado and includes state agencies as well as all of Colorado's political subdivisions.[45] It also includes labor unions and employment agencies.[46] The law prohibits discrimination because of a person's race, creed, color, sex, national origin, or ancestry. This prohibition operates against:

(1) Employers in;
   a. hiring,
   b. firing,
   c. promotion,
   d. demotion,
   e. matters of compensation[47]

(2) Employment agencies in;
   a. listing,
   b. classifying,
   c. referring,
   d. complying with a discriminatory request from an employer[48]

(3) Labor unions in;
   a. excluding from membership,
   b. expulsion from membership,
   c. denial of work opportunity.[49]

In addition, it is unlawful for an employer to place an advertisement for employees which is discriminatory in its specifications.[50] An

[41] *Id. See also* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation,* 74 HARV. L. REV. 526, 527 (1961).
[42] 6 BNA FAIR EMPLOYMENT PRACTICES 451:26-27 (1968).
[43] *Id.*
[44] *Id.*
[45] COLO. REV. STAT. ANN. §§ 80-21-2(5)(Supp. 1969), 80-21-6(1-2) (1963).
[46] *Id.* §§ 80-21-2(3-4) (1963), 80-21-6(1-4) (Supp. 1969).
[47] *Id.* §§ 80-21-6(1-2) (1969).
[48] *Id.* §§ 80-21-6(1-3).
[49] *Id.* §§ 80-21-6(1, 4).
[50] *Id.* §§ 80-21-6(1, 5).

additional paragraph covers persons who aid, abet, incite, compel, or coerce others into discriminating, or who obstruct or prevent others from complying with the law.[51] In 1963, the Colorado law was amended to cover discrimination in apprenticeship, on-the-job training, or other vocational training or instruction programs.[52]

Since 1963, sex discrimination has become an important issue under federal law. The first major piece of modern civil rights legislation by the United States Congress was the 1964 Civil Rights Act;[53] and one of the more important provisions in that law was Title VII,[54] the fair employment section, which included a proscription against sex discrimination as well as the usual categories of race, religion, color, and national origin.

In 1957, the first year of the Colorado commission's operation, Mr. Marlon Green, a Negro, filed a complaint charging Continental Air Lines with discrimination for failing to hire him as a pilot.[55] In 1957, the issue of whether a Negro could become an airline pilot was revolutionary in concept and the case was bitterly contested by Continental. Today, while it probably would be incorrect to say that discrimination does not exist in the airline industry, the question of whether a Negro could become a pilot is not out of the ordinary and is no longer the subject of tiresome racial jokes. Perhaps fair employment laws are effective, not only in eliminating discrimination in specific cases, but in changing the patterns and prejudices of our society.

The commission found that Mr. Green had been discriminated against and the decision was appealed to the Denver District Court, the Colorado Supreme Court, and the United States Supreme Court.[56] At every level of state court proceedings, the commission's finding of discrimination against the airline was held to be outside the scope of the jurisdiction of the state agency. The state courts held that Colorado had been pre-empted from legislation in the field of interstate commerce. The United States Supreme Court disagreed and ruled that Colorado did indeed have jurisdiction in this area and that the commission could regulate the hiring practices of interstate carriers within the state.[57] Civil rights in employment was thereby included as an area of concurrent jurisdiction between the states and the Federal Government.

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[51] *Id.* §§ 80-21-6(1, 6).

[52] *Id.* §§ 80-21-6(1, 7).

[53] 42 U.S.C. §§ 1975(a-d), 2000(a-h) (1964).

[54] *Id.* §§ 2000e-2000e(15) (1964).

[55] *See* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 149 Colo. 259, 368 P.2d 970 (1962), *aff'd* 372 U.S. 714 (1963).

[56] *Id.*

[57] Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963).

Lawyers anguish or delight in fine legal points, but they tend to forget how the man in the street is affected by the evolution of the law. It is interesting how many persons, including nonminority group members, know of the *Green* decision and that Mr. Green finally got his job, as he was thereafter hired by Continental pursuant to the commission's original order. This case, as much as any other, served to "establish" the commission and put employers on notice that in Colorado fair employment is more than just a mere statement of policy.

State legislation, in the area of fair employment, has not been the subject of much litigation; certainly not to the extent found in the area of fair housing. Perhaps this is because most respondents do not wish to engage in a legal challenge of the commission and/or the complainant's allegations. This may be for several reasons, not the least of which are the cost, and the fact that adverse publicity is bad for business. Generally, employers prefer to explore the conciliation process and settle the case amicably.

As Schroeder and Smith state in their treatise, *Defacto Segregation and Civil Rights,*[58] the only case to come before the United States Supreme Court on the constitutionality of state fair employment laws is *Railway Mail Ass'n. v. Corsi,*[59] which held the New York law valid. The Court ruled that there is "no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color, or creed by an organization, functioning under the protection of the state which holds itself out to represent the general business needs of its employees."[60] On the basis of this case, Schroeder and Smith have suggested that these fair employment practice laws are a valid exercise of state's police powers.[61]

While not dealing specifically with fair employment laws, there are some cases of interest which relate to discrimination in employment. These cases are class actions brought by Negroes against unions, employers, and governmental entities to invoke the injunctive powers of the courts to prohibit any continuance of a discriminatory pattern in employment and union membership.

One such decision is the case of *Todd v. Joint Apprenticeship Comm'n*[62] where a suit was brought by three Negroes against a labor union, its joint apprenticeship committee, a steel company, a

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[58] O. SCHROEDER & D. SMITH, DEFACTO SEGREGATION AND CIVIL RIGHTS 228 (1965) [hereinafter cited as SCHROEDER].

[59] 326 U.S. 88 (1945).

[60] *Id.* at 94.

[61] SCHROEDER, *supra* note 57, at 229-30.

[62] 223 F. Supp. 12 (N.D. Ill. 1963).

construction company, the United States General Services Administration, the United States Department of Labor and a local board of education. The court found that the plaintiffs were not admitted to the apprenticeship training program, were then refused membership in the union, and therefore not able to obtain a job on a federal construction project solely on the basis of their race and that there was no other remedy open to them to obtain relief. Interestingly enough, the defendants' counsel admitted the plaintiffs had a just grievance but alleged there was simply no remedy to their complaint. In response, Judge Campbell invoked the equitable doctrine *"ubi jus ibi remedium"* — where there is a right there should be a remedy.[63] While not citing any cases dealing directly with the issues before the court, the judge proceeded under the broad mandates of the fifth and 14th amendments of the Constitution and related cases,[64] and held that the plaintiffs were clearly being deprived of their constitutional rights.[65] Accordingly, the court ordered the various defendants respectively to train the plaintiffs, admit them to membership, and employ them.[66]

Subsequently, the court of appeals stated that it could not consider the validity of the district court's findings as the case had by then become moot since the construction for which the plaintiffs sought employment had been completed and there was no longer a viable issue before the court. Judgment was therefore vacated because of mootness and the appeal dismissed.[67]

In *Ethridge v. Rhodes,*[68] which, although very similar to *Todd,* does not cite the *Todd* decision, the judge foresaw the problem of a moot remedy and actually enjoined further construction on a state building until the plaintiffs were employed. The Negro complainants were denied a job by the contractor because they were not members of the union. On every occasion when they attempted to join the union the officials were conveniently "out" and "unavailable." The court found a clear pattern of discrimination because of race and further determined that no real remedy existed elsewhere for the complainants, in spite of the fact that there was a state fair employment practice law in Ohio[69] very similar to the law in Colorado.

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[63] *Id.* at 19.

[64] *Id.* at 20, wherein the Court quoted from the *Continental Air Lines* case, *supra,* then before the Supreme Court, and adopted the Court's statement that any law which denied applicants a job would be invalid under the due process clause of the fifth amendment and the due process and equal protection clauses of the 14th amendment.

[65] *Id.* at 22.

[66] *Id.* at 23.

[67] Todd v. Joint Apprenticeship Comm'n, 332 F.2d 243 (7th Cir. 1964).

[68] 268 F. Supp. 83 (S.D. Ohio 1967).

[69] OHIO REV. CODE § 4112.02 *as amended* (Anderson 1959).

The court ruled that the state "displayed a shocking lack of concern over the realities of the whole situation and the inevitable discrimination that will result from entering into and performing under the proposed contracts with the proposed contractors."[70] The court thereupon issued an injunction against the State of Ohio enjoining it from entering into or performing any contracts for the construction of the subject building and the employment of any individuals for such construction until the state, the contractor, and the labor union could show that the labor force was secured on a nondiscriminatory basis.[71]

The court was perhaps on somewhat stronger ground in *Ethridge* than in *Todd* in that in *Ethridge* a state was, under color of state law and state authority, contributing to discriminatory conduct and was therefore clearly in violation of the equal protection clause of the 14th amendment.

One of the most significant points about these cases is that the courts have assumed a responsibility which they believe the other branches of government have abrogated, or have been unable or unwilling to assume. These decisions go beyond a mere statement of a policy of the law and require the state and/or Federal Government to engage in affirmative action to correct the abuses inherent in a discriminatory pattern and insure that the pattern is eliminated. In addition, of course, the courts also make the point that public funds cannot *constitutionally* be used in any manner which follows or perpetuates a pattern of discrimination and *Ethridge* implies that these sums must be withheld until such discrimination ceases.[72]

Both of these decisions, but particularly the *Ethridge* decision, indicate that an alternative remedy may be available in Colorado in a civil rights matter by alleging a violation of basic constitutional rights. This alternative remedy appears to be available whether or not the jurisdiction of the Colorado Civil Rights Commission has been invoked by filing a complaint.

Shortly after the *Ethridge* decision, Ohio amended its law to void exclusive hiring agreements between a public works contractor and a union unless the union includes procedures for referring qualified employees without regard to race, color, religion, national origin, or ancestry.[73] Also, the Ohio Governor issued a new Executive order prohibiting the waiving of a nondiscrimination clause in public works contracts and requiring all public works contractors

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[70] Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

[71] *Id.* at 89.

[72] *Id.*

[73] OHIO REV. CODE §§ 153.581, 153.591 (Anderson 1967).

to obtain their labor forces from nondiscriminatory sources.[74] This Executive order, however, does not provide for the cancellation of a state contract where discrimination has occurred, which cancellation provision is the heart of Colorado Governor John A. Love's Executive Order of April 15, 1968.[75]

Probably more than any other type of civil rights statute, fair employment practice laws illustrate one of the basic problems with the form of the civil rights statutes being administered by the states today. The *Green* case is an example. It took Green seven years to obtain the job he should have been entitled to at the outset. If a commission finds for the complainant and orders affirmative relief, the commission will have succeeded only in providing a remedy for a single act of discrimination as it affects one person. Obviously this is chipping away at the problem and does little to remedy the basic prejudice which was manifested in the act of discrimination. Also, in approaching the problem on a case-by-case basis, the law is subject to abuses by both the complainant and the respondent.[76] It allows for the filing of questionable charges by a complainant and provides a procedure for a respondent to protract the awarding of relief to a complainant who cannot afford to wait.[77]

It is clear that the experiences of a decade or more have shown that the case-by-case approach utilized by the commission structure is not serving the purpose for which it was created. It is at the most a deterrent from continuing with a previous pattern of behavior. Something else is needed to not only require a halt to discriminatory actions but, beyond that, to change or alter the direction or pattern of the wrongful conduct. Perhaps the present type of enforcement should be retained as a last resort to force a discontinuance of unlawful actions, but only as a final step after some form of affirmative action encouraging voluntary action to benefit many individuals has first been attempted and has failed. It is this alternate method or type of approach which should be explored in detail as an adjunct

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[74] Executive Order, Gov. James A. Rhodes, June 5, 1967, at 6 BNA FAIR EMPLOYMENT PRACTICES 451:951 (1967).

[75] Executive orders are of dubious value, but if you do have one it is best to have a good one. It is submitted that without some enforcement provisions (such as cancellation of a state contract upon a violation) executive orders are mere proclamations or statements of policy and have a nice sound but beyond that are of little meaning or importance.

[76] 2 T. EMERSON, D. HABER & N. DOOSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, at 1957-65 (3d ed. 1967) [hereinafter cited as EMERSON].

[77] One of the major criticisms which was leveled at the Colorado Civil Rights Commission in a recent survey was the delay involved in the handling of a case (a delay which is in many respects unavoidable because of the requirements of the statute and the delay inherent in the commission-type approach to civil rights laws). Comment, *Investigation Procedures of the Colorado Civil Rights Commission*, 40 U. OF COLO. L. REV. 115 (1967).

to the system now employed — or possibly even to replace the present system.

III. Fair Housing Laws

Fair housing laws are relatively new as far as civil rights statutes are concerned — particularly in the area of private housing. The first contemporary fair housing statutes were limited to public housing and it was not until the late 1950's that legislation appeared affecting private housing and limiting a home owner in discriminating in the sale of his own property.[78]

Colorado, in 1959, was one of the first states to adopt a fair housing law which had jurisdiction over the sale of private property.[79] It was one of the most comprehensive laws in the country and, with several major amendments in 1965,[80] it is now considered to be the strongest such law administered by any state. One of the first cases filed with the commission under the Colorado act, *Colorado Anti-Discrimination Comm'n v. Case*,[81] established the constitutionality of the law and also pointed the way for subsequent amendments in 1965. In a 6 to 1 opinion, Justice O. Otto Moore of the Colorado Supreme Court wrote that the Colorado Legislature had accepted the challenge of the "forgotten Ninth Amendment"[82] and that:

> When, as at present, the entire world is engulfed in a struggle to determine whether the American concept of freedom with equality of opportunity shall survive; when tyrannical dictators arrayed against this nation in the struggle proclaim throughout the world, with some justification, that we do not practice what we preach, and that "equality of opportunity" is a sham and a pretense, a hollow shell without substance in this nation; we would be blind to stark realities if we should hold that the public safety and the welfare of this nation were not being protected by the Act in question. Indeed, whether the struggle is won or lost might well depend upon the ability of our people to attain the objectives which the Act in question is designed to serve.[83]

However, the court in the *Case* decision found that a portion of the law was unconstitutional. That section which allowed the commission to enter an order requiring a respondent to take "such other action as in the judgment of the commission will effectuate the purposes of this article"[84] was an unlawful delegation of

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[78] 2 Emerson, *supra* note 76, at 2050.

[79] Colorado Fair Housing Act of 1959, Colo. Sess. Laws of 1959, at 489.

[80] Colo. Rev. Stat. Ann. §§ 69-7-2 *et seq.* (Supp. 1965).

[81] 151 Colo. 235, 380 P.2d 34 (1962).

[82] *Id.* at 247-48, 380 P.2d at 41.

[83] *Id.* at 248, 380 P.2d at 42.

[84] Colo. Rev. Stat. Ann. § 69-7-6(12) (Supp. 1960).

authority and improperly gave the commission "carte blanche" authority to do as it saw fit.[85]

Various attempts were then made to define the commission's authority and in 1965 the law was substantially amended giving the commission authority to invoke the injunctive powers of the district court.[86] The law as presently written prohibits discrimination against persons because of their race, creed, color, sex, national origin, or ancestry in the:

(1) a. refusal to show, rent, sell, lease, or transfer housing, or to transmit a bona fide offer to buy, sell, rent or lease housing,
b. denial of the terms, conditions, or privileges relating to housing,
c. refusal to furnish any facilities or services in connection with such housing,
d. making of any written or oral inquiry or record which is discriminatory of a person seeking to purchase, rent, or lease housing.[87]

(2) a. making of any written or oral inquiry which is discriminatory of an applicant for financial assistance for the purchase, construction, or repair of housing,
b. discrimination in the terms, conditions, or privileges relating to the obtaining of financial assistance for housing.[88]

(3) a. utilizing or respecting of any discriminatory retrictive covenants.[89]

(4) a. discrimination in the advertising of housing for sale, transfer, rental, or lease.[90]

(5) a. aiding, abetting, inciting, compelling, or coercing another to commit any unlawful housing or discriminatory practice,
b. obstruction of any person from compliance with the Act or attempting to commit directly or indirectly, a discriminatory practice.[91]

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[85] Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 250, 380 P.2d 34, 43 (1962).

[86] COLO. REV. STAT. ANN. § 69-7-6(6)(b) (Supp. 1965).

[87] *Id.* § 69-7-5(1)(a,b) (Supp. 1965).

[88] *Id.* § 69-7-5(1)(a,c) (1963).

[89] *Id.* § 69-7-5(1)(a,d) (Supp. 1965).

[90] *Id.* § 69-7-5(1)(a,e) (Supp. 1965).

[91] *Id.* § 69-7-5(1)(a,f) (1963).

(6) a. discrimination against any employee or agent for obedience to the Act in matters of compensation, discharge, or demotion.[92]

All property publicly advertised for sale, lease, or rent is covered by the act with the only exception being the "Mrs. Murphy's boarding house" situation where a single family home is occupied by an owner or lessee as a household and rooms are offered for lease or rental.[93] No logical reason exists for this exception and anyone interpreting it should take as restrictive a view as possible. The commission will adopt such restrictive position in handling a case involving this factor and presumably a court will also, since no public policy or benefit is served by such a limitation; and as the police power of the state has been invoked by the passage of such legislation, the provision should be strictly construed as being contrary to the general purpose and policy of the statute which was enacted to prohibit discrimination. Regardless of whatever motives may have prompted the legislature to create such an exception, it should be removed from the statute because such anomolies cannot stand the test of an independent evaluation and serve only to detract from the law as a whole while performing no purpose whatsoever when read in the context of the entire statute.

The law makes no distinction between private homes offered for sale or rent by the owner himself or through a realtor; it means *any* real property, including vacant land and commercial space.[94] However, other limitations are an exclusion of nonprofit, fraternal, educational or social organizations or clubs,[95] and an allowance for religious or denominational institutions to give preference in housing to persons of the same religion or denomination.[96] In addition, there is a permissive clause for leasing premises to members of only one sex.[97]

As will be subsequently discussed, the statute sets forth a procedure to be followed in the processing of a complaint before the commission.[98] This is inherently a time consuming process and allows for a respondent to dispose of the property or otherwise make it unavailable to the complainant by the time of a hearing.

[92] *Id.* § 69-7-5 (1)(a,g) (Supp. 1965).
[93] *Id.* § 69-7-3(1)(d) (1963).
[94] *Id.* § 69-7-5(1)(a,b) (Supp. 1965).
[95] *Id.* § 69-7-3(1)(c) (Supp. 1965).
[96] *Id.* § 69-7-5(2) (1963).
[97] *Id.* § 69-7-5(3) (1963).
[98] *Id.* § 69-7-6 (1963).

One of the decided advantages of the Colorado law is that portion of the 1965 amendment which gives the commission the authority to seek an injunction from the district court holding the house in *status quo* until the complaint can be heard by the commission.[99] The injunction is an extraordinary remedy and is used by the commission only when it finds some evidence that the respondent is attempting to make the housing in question unavailable by transferring ownership or possession to a third party. Generally speaking, this becomes immediately evident to the commission's investigator and if an injunction is thought necessary by the commission coordinator he requests the assistant attorney general to commence injunctive proceedings within one or two days after a complaint has been filed and investigation initiated.

Because of the procedural requirements of the act, the commission must meet several prerequisites before an injunction can be obtained. There must be a preliminary investigation, a finding of probable cause, and a failure to settle the complaint by conference, conciliation or persuasion.[100] Also, the commission generally serves the respondent with a "Notice to Answer" either prior to the injunction proceedings or at the time of the service of the notice of the setting for the preliminary injunction.

Since only the Civil Rights Commission can find whether a discriminatory act has occurred,[101] it is not the function of the court at the injunction hearing to try the issues raised in the complaint alleging discrimination. The only question for the district court to consider on the commission's motion for a preliminary injunction is whether there are sufficient grounds for the granting of the injunction, *e.g.,* irreparable harm, injury or loss, and no other adequate remedy at law. Since real property is by definition *sui generis* under the common law, it is only necessary to show to the court that the respondent is attempting to dispose of the property to another person in order to show irreparable harm, injury, or loss to the complainant because that particular parcel of property would then be unavailable to the complainant. This is a special, statutory remedy authorizing the commission to take action, on behalf of another, to obtain injunctive relief agaist a third party.

The complainant must, of course, put up a bond as security for damages to the respondent if he is not successful in eventually showing at a hearing before the commission that a violation of the

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[99] *Id.* § 69-7-6(6)(b) (Supp. 1965).
[100] *Id.* § 69-7-6(6)(a) (Supp. 1965).
[101] *Id.* § 69-7-6(6)(a,b) (Supp. 1965).
[102] *Id.* § 69-7-6(6)(b) (Supp. 1965).

act has occurred.[102] The act provides for an initial preliminary injunction for 60 days with an extension for another 60 days if necessary.[103]

Since the power of injunction was added to the act, approximately 230 housing cases have been filed with the commission.[104] It has only been necessary to file for and obtain an injunction in eight of these cases.[105] The mere fact of the existence of the injunctive powers of the commission is usually the only deterrent needed to prevent a respondent from attempting to dispose of the property.

Should a respondent manage to dispose of the property to a bona fide third party (*i.e.*, no injunction has been obtained), and a hearing has been held before the commission and a violation of the act found, but the respondent has failed to comply with the orders of the commission, a complainant may file a civil action against the respondent. The complainant can then recover his actual damages, interest, and costs from the respondent, and the court may further order similar housing made available to the complainant if the circumstances warrant.[106] This provision is of little value as a deterrent as it does not provide for exemplary damages. Also, if similar housing were not available from the respondent at the time of the commission hearing, the only order the commission could issue under the Case decision would be a cease and desist order against the respondent and the complainant would then have to prove a violation of that order before he could initiate a civil action in court. Violation of the commission's cease and desist order would be for all practical purposes, impossible to prove, as the plaintiff would have to show subsequent acts of discrimination related to the initial charges filed with the commission.[107]

Following a hearing, if the commission finds that an act of discrimination has occurred, it can enter an order requiring the respondent to sell, transfer, rent, or lease the housing to the complainant; to cease and desist from further acts of discrimination; or to grant financial assistance or to rehire and compensate an employee who has been discharged because of compliance with the act.[108] The specific remedy to be applied will depend upon the circumstances of the particular case.

In addition to Colorado, fair housing laws have been found to

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[103] *Id.* § 69-7-6(6)(e) (Supp. 1965).

[104] COLORADO CIVIL RIGHTS COMMISSION, A TIME FOR CHANGE AND CHALLENGE — CIVIL RIGHTS IN COLORADO 1966-1968.

[105] *Id.*

[106] COLO. REV. STAT. ANN. § 69-7-8 (Supp. 1965).

[107] *Id.*

[108] *Id.* § 69-7-6(12) (Supp. 1965).

be constitutional in five other states: California,[109] Connecticut,[110] Massachusetts,[111] New Jersey,[112] and New York.[113] Of these, all but the California decision related to fair housing laws covering private housing. California's case is applicable only to publicly-assisted housing. A Washington case holding the opposite is *O'Meara v. Washington State Board Against Discrimination*,[114] which held that the law unconstitutionally classified housing by banning discrimination in publicly-assisted housing while not including private housing. The *O'Meara* decision was specifically considered and rejected in California[115] and a previous New Jersey case.[116]

To date, 23 states have adopted fair housing statutes in various forms.[117] In addition, Congress has recently passed a federal fair housing statute.[118] The federal law, although not as broad as the Colorado statute, does cover all housing except private homes sold through a realtor.[119] One of its weaknesses is lack of adequate enforcement powers. The only real affirmative remedy provides that an aggrieved person may file a civil suit to make the housing available, and/or for damages;[120] but there is no specific provision prohibiting the defendant from making the housing unavailable while the case is being prosecuted, and the administrative procedures required before a civil suit can be entertained will inevitably take a considerable period of time. If he can, the plaintiff will have to seek an early injunction in the district court if he is serious about having the property in question or it will surely become unavailable by the time he can obtain a court order requiring that it be made available to him and he will then only be entitled to damages. As far as Colorado is concerned, however, the federal law will have

[109] Burkes v. Poppy Constr. Co., 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

[110] Swanson v. Commission on Civil Rights, No. 94802 (Sup. Ct. New Haven Co., Conn. July 11, 1961).

[111] Massachusetts Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 182 N.E.2d 595 (1962).

[112] David v. Vesta Co., 45 N.J. 301, 212 A.2d 345 (1965).

[113] Cooney v. Katsen, 41 Misc. 2d 236, 245 N.Y.S.2d 548 (Sup. Ct. 1963).

[114] 58 Wash. 2d 793, 365 P.2d 1 (1961), *cert. denied*, 369 U.S. 839 (1962).

[115] Burkes v. Poppy Constr. Co., 57 Cal. 2d 463, 470, 316 P.2d 313, 320, 20 Cal. Rptr. 609, 616 (1962).

[116] Jones v. Haridor Realty Co., 37 N.J. 384, 394, 181 A.2d 481, 486 (1962).

[117] *See* EMERSON, *supra* note 76, at 2058. Note that this source only refers to 19 states. Subsequently, the following states have adopted housing statutes: Hawaii, Session Laws of Hawaii, 1967, Act 193, at 194; Iowa, IOWA CODE ANN. §§ 105 A.2, 105 A.9 (Supp. 1969); Maryland, MD. ANN. CODE art. 49B, §§ 21 *et seq.* (1968); Vermont, VT. STAT. ANN. tit. 13, § 1452 (Supp. 1968). EMERSON also includes a rather comprehensive list of other authorities on the general subject of fair housing.

[118] Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601-19 (Supp. 1969).

[119] *Id.* § 3603(b)(1). Private homes sold through a realtor will not be exempted after Dec. 31, 1969.

[120] *Id.* § 3612.

little, if any, effect since the Secretary of Housing and Urban Development will defer to the state because Colorado has a law which is "substantially equivalent" to the federal act.[121]

Considering their relatively recent appearance on the scene, fair housing laws seem to have generated more litigation than any other type of civil rights statute. The adoption of this type of statute is frequently bitterly opposed and such opposition is generally spearheaded by representatives of the real estate profession. In Colorado this was quite evident in 1959 when the state's fair housing act was before the general assembly. However, experience with fair housing has demonstrated to the real estate profession the desirable effects of a statewide prohibition against discrimination. The imagined fears of integrated housing have not materialized (*e.g.*, reduction in property values in areas where integrated housing occurs and a vitiation of real property rights). There has been a general reversal of attitude by the building and real estate industry in Colorado to the point where in 1965, when the fair housing act was again before the general assembly for amendment, the Colorado real estate and building industry generally supported the concept of fair housing. This was evidenced by the adoption by CAREB (Colorado Association of Real Estate Boards) on October 10, 1964, of a resolution endorsing fair housing, and rejecting any discriminatory practices by its members.[122] This is not to say that discrimination does not exist in the profession, but it does demonstrate that responsible members of that group have seen the validity and benefit of such a law.

Other states, such as California, have experienced a different response. In that state, Proposition 14 was adopted by popular initiative to amend the state constitution.[123] This amendment prohibited the state legislature from interfering with a property owner's absolute discretion to sell, rent, or lease his property as he saw fit. The amendment to the state constitution was a direct assault against the Rumford Act,[124] California's fair housing statute. Following the passing of Proposition 14, the amendment was challenged. Both the California Supreme Court[125] and the United States Supreme Court[126] held that such a provision in a state constitution was a violation of the 14th amendment to the United States Constitution

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[121] *Id.* § 3610(c-d).

[122] Resolution on file in office of Colorado Association of Real Estate Boards, Denver, Colorado.

[123] CAL. CONST. art 1, § 26 (1964).

[124] CAL. HEALTH & SAFETY CODE, §§ 35700-35744 (1962).

[125] Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

[126] Reitman v. Mulkey, 387 U.S. 369 (1967).

in that it was an attempt, by state action, to deny a segment of the citizens of the State of California equal protection of the state's laws. In effect, it was a constitutionally guaranteed license to discriminate.

Civil rights and a charge of discrimination generally cause a visceral reaction in people who are brought into contact with the issue through a civil rights complaint. In such cases, the response is almost totally emotional. In the experience of the Colorado Civil Rights Commission, this kind of reaction occurs to a far greater extent in housing cases filed with the commission than in any other type of case. It would seem that while some persons may not have a strong objection to working or eating next to a Negro, for example, the thought of actually living next to one as a neighbor is unacceptable.[127] This attitude is, of course, contrary to our philosophy of basic equality. Our system, as evidenced by the laws under which we live, means equal opportunities, advantages, and privileges for all and that the only limitations that a person should face are those of himself as an individual.

This precept is reflected in a case recently decided by the United States Supreme Court. In *Jones v. Alfred H. Mayer Company*,[128] suit was brought against the defendant home builder because of its refusal to sell a subdivision home to them because they are Negroes. The defendant was a private builder operating without the benefit of any state or federal funds. The suit claimed that this discrimination was unconstitutional and asked for special and exemplary damages and/or a mandatory injunction. The federal district court dismissed the case for failure to state a claim for which relief could be granted.[129] The court of appeals upheld the district court's action but at the same time noted constitutional justification for holding that the action of respondents constituted prohibited racial discrimination but felt itself bound by past Supreme Court decisions.[130] While a portion of the plaintiffs' case rested upon existing federal statutes, the plaintiffs also raised fundamental constitutional questions regarding the action of the defendant in refusing to sell to them because of their race. The Supreme Court ruled that the Federal Civil Rights Act of 1866,[131] under which the case was filed and which prohibited racial discrimination in the sale or rental of real property was valid and constitutional under the provisions of the 13th amendment. Every citizen may buy or rent real property under

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[127] G. MYRDAL, AN AMERICAN DILEMMA (1942).

[128] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[129] Jones v. Alfred H. Mayer Co., 255 F. Supp. 115 (E.D. Mo. 1966).

[130] Jones v. Alfred H. Mayer Co., 379 F.2d 33 (8th Cir. 1967).

[131] 42 U.S.C. § 1982 (1866).

the law without limitation by the offeror because of the race of that citizen.

The decision does not conflict with the pertinent provisions of the 1968 Civil Rights Act,[132] as this new law, if anything, supplements the earlier statute by more carefully defining the manner in which Congress wishes to implement the 13th amendment.

Therefore, by federal statute, and by the *Jones* decision, fair housing has become the law of the land, but, as previously stated, it establishes a standard already set in Colorado. However, setting a standard does not solve the problem, it only serves to identify the problem and announce that one actually exists. The real work of its elimination is then only just beginning.

IV. PROCEDURE.

The final portion of this article is an explanation of how the Colorado Civil Rights Commission administers the law and the procedures established for the handling of a case.

Under the three statutes previously discussed, any person who feels that he has been discriminated against may file a complaint.[133] The commission does not have discretion to refuse to accept a complaint unless jurisdiction is clearly absent (*e.g.*, a complaint against the Federal Government or in an area outside of employment, housing or public accommodations). In addition to an aggrieved person, a complaint may also be filed by a commissioner, the commission, or the attorney general.[134] The various statutes require that a complaint must be filed within a specified period of time following the date the alleged act of discrimination occurred or the statutory right will lapse. These time limitations are as follows:

(1) Employment ..... 6 months.[135]
(2) Housing ..... 90 days.[136]
(3) Public Accommodations ..... 60 days.[137]

Immediately upon filing, the case is assigned to a commission civil rights specialist who conducts an investigation of the charges of discrimination. Under commission rules of practice and procedure, the respondent must receive a copy of the complaint within 20 days of filing with the commission. Service may either be accomplished

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[132] P.L. 90.284, 82 Stat. 73 (1968).

[133] COLO. REV. STAT. ANN. §§ 25-3-1, 80-21-7(1) (1963); *Id.* § 69-7-6(1)(a) (Supp. 1965).

[134] COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 2F(3), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

[135] COLO. REV. STAT. ANN. § 80-21-7(15) (1963).

[136] *Id.* § 69-7-6(15).

[137] *Id.* § 69-7-6.

by the investigator personally or by certified mail.[138] Amendments may be, and frequently are, made to the complaint upon information gathered during the investigation.[139]

It must be emphasized that at this stage of the proceedings, the commission staff is only attempting to determine the position of the respondent with respect to the charges of discrimination made by the complainant. In effect, the staff is only interested in getting the other side of the story, which the staff is required to do by law once a complaint has been filed.[140] If any difficulties are encountered by the staff in conducting their investigation, they will utilize subpoenas duces tecum and depositions to obtain the information thought to be necessary to properly investigate the case. These procedures are available throughout the handling of the case including, of course, the preparation of the case for a hearing.

Once the preliminary investigation is completed, the report of the investigator is prepared and submitted to the coordinator (director) of the commission for an evaluation. The coordinator will determine whether or not in his opinion "probable cause" exists to credit the allegations of discrimination made in the complaint.[141] If he finds no probable cause, the case is summarily dismissed and the proceedings are terminated. If probable cause is found, the commission will continue with the case and attempt to resolve the issues amicably by conference, conciliation, or persuasion.[142]

The concept of probable cause has proved difficult for some persons to understand. Since the commission must accept all cases that are filed except those which can be summarily rejected for lack of jurisdiction, some procedure must be established to weed out cases which are clearly spurious or which do not contain the needed element of discrimination on the basis of race, creed, color, national origin, or ancestry. Examples would be where the inevstigation reveals that the actions of the respondent were entirely justified or obviously were not motivated by discriminatory reasons, (*i.e.*, employment cases where the complainant was denied a job for clearly being unqualified for the position, or in housing cases where an applicant did not meet the requirements of the landlord, *e.g.*, having children where children were not allowed). Various attempts have

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[138] COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 2F(3), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

[139] *Id.* Rule 2G.

[140] COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 3(A), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:186(a) (1967).

[141] COLO. REV. STAT. ANN. §§ 25-3-4, 80-21-7(3) (1963); *Id.* § 69-7-6(3) (Supp. 1965).

[142] COLO. REV. STAT. ANN. §§ 25-3-4, 80-21-7(3) (1963); *Id.* § 69-7-6(3) (Supp. 1965).

been made to define probable cause, including an attempt by the Colorado legislature in the Fair Housing Act.[143]

The only case found which specifically defines probable cause as the same as set forth in a civil rights statute is *Barnes v. Goldberg*,[144] where a New York Supreme Court quoting an earlier decision stated: "Probable cause exists when there is reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated. . . ."[145] This was a housing situation, but the application would apply in any civil rights case requiring an administrative finding of probable cause. The authority quoted in the *Barnes* case was another New York decision which dealt with an entirely different matter — the probable cause which must be found by a magistrate for the issuance of a search warrant.[146] It is submitted that this test is far too restrictive and will encourage the finder of probable cause to be too critical of his evidence and cause him to require that the quantum of evidence to make such a finding be too high.

The problems encountered in proving a case of discrimination are difficult enough, and it is too much to expect that *every* case in which probable cause is found will proceed to a public hearing. The official who makes this finding of probable cause cannot use as his criteria whether the case would stand up to the level of proof required at a hearing. If he did, very few cases would be accepted and he cannot be that demanding for the additional reason that before a case proceeds to a hearing generally further investigation is conducted. Therefore, he is really in no position to judge the case on its hearing merits at that point.

Generally speaking, *any* evidence which indicates a discriminatory motive for the respondent's conduct should be enough to

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[143] COLO. REV. STAT. ANN. § 69-7-3(1)(k) (Supp. 1965):

> Probable cause shall exist if upon all the facts and circumstances a person of reasonable prudence and caution would be warranted in a belief that the transction would have proceeded to completion except that an unfair housing practice of refusal to sell, transfer, rent, or lease had been committed. As to all other unfair housing practices, probable cause shall exist if upon all the facts and circumstances a person of reasonable prudence and caution would be warranted in a belief that an unfair housing practice has been committed.

This definition reflects the trepidation of the Legislature in its attempt to explain probably cause. Since the first sentence defines probable cause as it relates to a refusal to "sell, transfer, rent, or lease," it covers most of the acts set forth elsewhere as unfair housing practices. The only unlawful practice not covered is a refusal to show, so, presumably, this is the unlawful act covered by the second sentence as it is the only act left, although the second definition is supposed to refer to all other unfair housing practices.

[144] 54 Misc. 2d 676, 283 N.Y.S.2d 347 (Sup. Ct. 1966).

[145] *Id.* at 352.

[146] People v. Marshall, 13 N.Y.2d 28, 191 N.E.2d 798, 241 N.Y.S.2d 417 (1963).

satisfy the official that probable cause exists. What is *evidence* is another question. A pattern may appear in the investigation not related to the case at all, such as an insignificant or negligible percentage of minority people employed at a plant and those few who are employed occupying positions of menial work or as laborers. In such a case, if there is a complete absence of evidence pointing to discrimination against the particular complainant and an acceptable reason for the action of the respondent, it is hard to see how the official can justify a finding of probable cause on such evidence alone. In another circumstance, such a pattern of employment may give considerable weight to an otherwise relatively weak case. Evidence as used in this context therefore, means evidence directly related to the case in point before the official. There are some good reasons for suggesting that even a scintilla of evidence should be sufficient for a finding of probable cause. One of the most frequent criticisms leveled against civil rights commissions is that they dismiss far too many cases for a failure to find probable cause.[147] Proceeding with the case wherever possible gives the commission the opportunity to obtain some affirmative relief for the complainant by conciliation. If the finding is unsubstantiated, the respondent can challenge it at the point of conciliation without having to defend himself at a hearing. A case can always be dismissed at a later date if the commission staff finds the case is deficient for a hearing. Furthermore, since one of the Colorado commission's statutory functions is the elimination of discrimination by education,[148] the commission performs an important educational function at conciliation conferences.

The process of conciliation is misunderstood by some. It is not an adversary proceeding, although it frequently takes that form. It is an attempt to resolve the issue by the process of bargaining or negotiating for a settlement. On the basis of long experience, the commission staff has a policy of not having both the complainant and respondent together at the same conference except in the most unusual of circumstances. In its best form, a conciliation conference is a quiet, deliberate study of the case, and an attempt to work out a resolution of the issues which is acceptable to all of the parties. At its worst, a conciliation may degenerate into personal attacks on each other by the participants, and accusations, challenges, and thinly veiled threats of political or legal action against the commission, its staff, or the complainant.

The usual procedure is for the commission staff to present the

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[147] *See* SOVERN, *supra* note 35, at 46-47; EMERSON, *supra* note 76, at 11.

[148] COLO. REV. STAT. ANN. §§ 25-3-3, 69-7-4 (1)(f), 80-21-5(5) (1963).

evidence gathered in the investigation to the respondent, together with a suggested solution of the case, and then ask for a response. The respondent then points out what his position is and either accepts the proposal, makes a counter proposal, or rejects any possibility of conciliation. In a successful conciliation there is usually a withdrawal by both parties from their original position to a mutually acceptable middle ground. In employment cases, for example, the commission staff may not pursue the issue of back pay but may discuss some form of reinstatement or hiring. A great deal of the flexibility of the commission's position depends upon the strength of the case. If the evidence of discrimination is rather clear cut, the staff will usually take the position of obtaining for the complainant everything he could realize if the case were taken to a hearing and there was a ruling in favor of the complainant.

Approximately 45 percent of the cases filed with the commission are dismissed because of a failure to find probable cause, or because the case is dropped by the complainant before a finding is made. Approximately 96 percent of the remaining cases are disposed of by conciliation or conference affording some form of affirmative relief to the complainant. Very few cases, therefore, actually proceed all the way to a public hearing.[149]

The commission attempts to resolve as many cases as possible by the process of conciliation or conference. If unsuccessful, however, the case can then proceed to a public hearing.[150] At the time of the hearing, great care is taken to insure that none of the hearing commissioners or the examiner have any prior knowledge of the case. If there has been any prior contact or knowledge by an individual commissioner with a particular case, that commissioner will usually disqualify himself from sitting at a hearing. Such contact or information may occur where a complainant wishes to appeal a dismissal by the coordinator of his case because of a finding of no probable cause. Such appeals are always allowed to be presented to the commissioners; however, when one is brought before them, they appoint a single commissioner to hear and consider the complainant's argument, separate and apart from the other commissioners. This appointed commissioner will then report his suggested course of action to the other commissioners, and his suggestion is generally followed. That commissioner then disqualifies himself from sitting should the case eventually end in a hearing.

[149] These figures were taken from a report prepared by the commission of its operations since it began functioning in its present form in 1957. This report was included, in part, in a study conducted of the Commission and printed in Comment, *Investigation Procedures of the Colorado Civil Rights Commission*, 40 U. OF COLO. L. REV. 119-21 (1967).

[150] COLO. REV. STAT. ANN. §§ 25-3-4, 80-21-7(6) (1963); *Id.* § 69-7-6(6)(a) (Supp. 1965).

Prior to a hearing, the commission must issue a notice to answer requiring that the respondent file a verified answer within 10 days of the service of the notice, or not less than five days prior to the hearing.[151] Thereafter, the commission serves the respondent with a notice of hearing, advising him that the case has been set for formal hearing. This notice must be served at least 15 days in advance of the hearing.[152] At the public hearing, the case for the complainant is presented by the assistant attorney general assigned to the commission as legal counsel. The statute provides that the commission "shall not be bound by strict rules of evidence prevailing in courts of law or equity, but the right of cross-examination shall be preserved."[153] In its rules, the commission has gone one step further and provided that "such rules and requirements of proof shall conform to the extent practical, with those in civil noninjury cases in the district courts."[154] The hearing is conducted by either a hearing examiner appointed for that purpose or by a commissioner or a number of commissioners.[155] There has generally been at least one commissioner who is an attorney to act as a hearing officer and rule on motions, the admissibility of evidence, etc. Only commissioners or a specifically appointed hearing examiner hear cases and the investigative staff and the coordinator do not participate at the hearings except to give evidence through testimony as a witness.[156] Before the commencement of the hearing, either party may move for the exclusion of witnesses.[157]

All pertinent matters relevant to the hearing are considered in advance. No provision is made either in the rules or in the statutes for motion practice prior to the actual hearing. The only way a party could have a motion heard, either on substantive or procedural grounds, would be to ask for a special hearing before the commissioners or to take such matters up at the time the hearing itself is convened. Except for their regular monthly meetings which include a rather lengthy agenda, the only time commissioners meet

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[151] COLO. REV. STAT. ANN. §§ 25-3-4, 69-7-6(6), 80-21-7(6) (1963). In addition, 69-7-6(8) states that the respondent shall file his answer within five days of the hearing. Possible conflicting provisions have been resolved by commission rules (COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 6A(3) (1965) which state that if a respondent has answered once, his answer will be deemed by the commission to be the respondent's answer for all purposes).

[152] COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE 6A(3), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

[153] COLO. REV. STAT. ANN. §§ 69-7-6(11), 80-21-7(11) (1963).

[154] COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 7D(2), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

[155] COLO. REV. STAT. ANN. § 80-21-7(6) (1963); *Id.* § 69-7-6(6)(a) (Supp. 1965).

[156] COLO. REV. STAT. ANN. §§ 25-3-4, 69-7-6(7), 80-21-7(7) (1963).

[157] COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 7L, at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

is for a hearing. Therefore, motions are generally argued at the time of the hearing.

The hearing itself, of course, is very much an adversary proceeding. The proceedings are conducted in the same manner as a trial before a court without a jury. The complainant's case is presented first, generally by the assistant attorney general assigned to the commission, followed by the presentation of the case for the respondent. Opening and closing statements, motions, objections, and the introduction of exhibits are the same as in a trial court. The examination of witnesses is also the same; direct and cross, followed by redirect, etc., if desired. The admissibility of evidence both as testimony and as exhibits is somewhat more relaxed than in a trial court, particularly since the evidence is frequently subjective in nature. However, the degree of such relaxation or deviation from normal trial practice is not very great. The commissioners or hearing examiner generally do not admit hearsay evidence. Opinion testimony is limited and, when allowed, is only considered and weighed on the basis of who is giving such testimony and the circumstances associated with such statements and, although admitted, may be given little or no probative value.

As with any administrative hearing, the proceedings are recorded by a reporter and a transcript can be prepared if the case is appealed. Either party may appeal the final decision of the commission but must do so within 30 days of the date of the final order.[158] Orders of the commission are enforceable through the Colorado district courts. If a respondent has not appealed, but has refused to comply with a commission order, the decision will be certified to the district court and an order of the court issued requiring compliance with the commission's order.[159]

As with any judicial or quasi-judicial proceeding, objections not raised at the hearing cannot be raised to the court on appeal unless the failure to object can be attributed to extraordinary circumstances.[160] Under the statutes, only the Civil Rights Commission can make the determination of whether an unlawful act of discrimination has occurred and the findings of the commission are binding on the court so long as they are supported by adequate evidence.[161] Based upon the evidence presented at the commission hearing and set forth in the transcript, however, the court can enter an order on appeal enforcing, modifying, or reversing the decision of the commission.[162]

[158] COLO. REV. STAT. ANN. §§ 25-3-5, 69-7-7, 80-21-8 (1963).
[159] *Id.* §§ 25-3-5, 69-7-7(12), 80-21-8(12).
[160] *Id.* §§ 25-3-5, 69-7-7(4), 80-21-8(12).
[161] *Id.* §§ 25-3-5, 69-7-7(6), 80-21-8(6).
[162] *Id.* §§ 25-3-5, 69-7-7(3), 80-21-8(3).

CONCLUSION

Having had the benefit of 12 years of operation, we can now look back on the manner in which the commission has been carrying out its duties and assess its performance. It was charged with the responsibility or objective of achieving a more favorable climate for human relations and to come as close as possible to eliminating discrimination in Colorado. No one could realistically believe that, by itself, the commission will ever realize this goal. It is in reality, a very limited attempt to realize some success in a specifically defined area.

Nevertheless, the commission is effective in performing its statutory duties — it has been doing its job. The question then arises as to whether these duties should be changed, enlarged, or expanded; and if so, how much and in what manner? Admittedly there is work to be done, but can the commission, no matter how it is structured or no matter what powers and authority it is given, completely eliminate discrimination? Clearly, the answer is no. For Colorado, something else is certainly needed. Additionally, the problems and the types of discrimination for which the commission was created in 1957 are not the same today.

This does not mean, however, that the commission should be abandoned. Since the state has gone on record as having a definite position on civil rights, there must be some manifestation of that policy. The government as an entity must give some formal recognition to its declaration, and there should exist some means of enforcement of this policy when necessary. The present method to enforce compliance with the statutes' objectives is through the police powers of the state, and work should be undertaken to improve its enabling laws to allow the commission to perform that function more easily and more efficiently.

This still leaves unanswered the much larger question of what else should be done. The work of the commission is after the fact, and therefore only treats the symptoms of the disease; it does nothing to effect a cure of the malady itself. A new approach which deals with the situation on a different basis than a piecemeal or case-by-case basis is necessary. The current concept is one of reaction rather than action. The state waits for others to initiate the process or start up the machinery and then it only solves, or partially solves, that particular incident, having done nothing about the reasons or causes which gave rise to the incident initially. The concept of affirmative action, *i.e.*, action which is initiated by the state or Federal Government, without waiting to

be asked to react, or being forced to, is now the byword of civil rights and human rights dialogue.

Recognizing this, the commission has recently created a study group of educators and lawyers to examine Colorado's civil rights statutes and: (1) determine what should be done to the laws under which the commission operates to allow it to more effectively accomplish its basic purpose of administration and enforcement, and (2) make some attempt to articulate what new approaches can be undertaken by the State to implement an affirmative action civil rights program. No one program will be a panacea and no single idea will be a complete remedy, but the commission hopes to draft a new focus or approach to the work it is doing, and to be able to suggest a program to the state which will impart a new direction to the manner in which civil rights or human rights are handled in Colorado.

Periodic examination of state civil rights laws will inevitably result in a patchwork of statutes with overlapping provisions and troublesome omissions. The effect is also that of losing sight of the basic purpose of such laws and whether such purpose is being realized. Hopefully, by taking an objective look at what can be done and what is not being done, some significant steps can be made to achieve the ultimate goal of putting the Civil Rights Commission out of business.

The commission study group did produce an omnibus civil or human rights statute[163] which brings the present structure and

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[163] The proposed bill's declaration of purpose reads as follows:

> The legislature hereby finds and declares that the state and all persons within it have the responsibility to act affirmatively to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life. Failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance, indifference or inadequate education, training, housing or health care threatens the rights, privileges and personal dignity of all individuals and menaces the institutions and foundations necessary for a productive, open and democratic society.
>
> To implement this finding and declaration, in fulfillment of the provisions of the constitution of this state concerning civil rights and in exercise of the police power of the state to preserve and further public welfare, health and peace, a commission shall be created in the executive department. This commission shall have general jurisdiction and power to develop, coordinate and execute programs designed to ensure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state, and it shall encourage and promote the development and execution by all persons within the state of such programs, including programs to reduce community-wide or state-wide imbalances in employment, education or housing opportunities with respect to certain racial, religious and ethnic groups. The commission shall eliminate and prevent discriminatory practices as herein provided, including discrimination because of race, creed, color, or national origin in employment, public accommodations, educational institutions, public services and real estate transactions; discrimination because of sex in employment, public accommodations, public services and real estate transactions; and discrimination because of age in employment.

Proposed bill on file at the office of The Colo. Civil Rights Comm'n, Denver, Colo.

approach of the commission up-to-date and does give it some of the tools needed to cope with the problems of discrimination today. This bill, or a portion of it, will be introduced for consideration in forthcoming sessions of the Colorado General Assembly.

This omnibus bill does not attempt, nor was it so drafted, to solve the larger problem of attacking discrimination on a broader front. Hopefully, through the cooperation of other agencies (*i.e.*, the law schools, the bar associations, or in conjunction with private or governmental agencies), a plan or proposal can be worked out to implement such an alternative plan of action. Without such an approach it is difficult to see how any progress can be made. The present laws only serve to prevent a worsening of the present condition, and do nothing to improve or correct the situation facing us today.

REPRESENTATION, SUIT, AND TRIAL IN AUTOMOBILE LIABILITY CLAIMS[1]

BY H. LAURENCE ROSS*

Drawing upon empirical data, interviews, and observations of the automobile injury claims settlement process, Dr. Ross explores the effects of representation, suit, and trial on the recovery of damages from an insurance company. These effects are explained largely in terms of an analysis of the negotiation process which disposes of the vast majority of claims which arise. He also delineates what kinds of cases are most likely to be represented and most likely to go to trial, and suggests some explanations for these findings. The evidence supports the author's thesis, presented more thoroughly in his forthcoming book, that the attorney's ability to negotiate settlemens skillfully is far more significant in terms of its effect on recovery than is his knowledge of the formal law.

HOW does the claimant represented by an attorney fare, in comparison with the unrepresented claimant, in securing recovery for bodily injury from an automobile liability insurance company? Are there differences in recovery in sued and tried cases, as opposed to cases that are merely represented?[2] What types of claims are most likely to be represented, sued, and tried? This paper will address these questions with empirical data drawn from a larger study of the claims settlement process.[3]

The data presented below were obtained from a sample of files provided by a large insurance company, which shall be called Acme. The company is reputed to be rather typical of large stock companies in its claims procedures. The files are a random sample, numbering 2216, drawn from the closed files received by the main office from its field offices in March and April of 1962. Preliminary analyses revealed that, as expected, there were strong relationships between the amount paid on a file and the economic loss, or total special damages, documented in the file, and between payment and apparent liability, as measured by the configuration of vehicles

*Professor of Sociology and Law, University of Denver College of Law.

[1] To be published and copyrighted by the author as part of a forthcoming book; H. ROSS, SETTLED OUT OF COURT (Aldine Publishing Co. in 1970).

[2] The term *trial cases* refers to those cases which involve the trial process for the resolution of a claim. The term *suit cases* refers to claims which have been filed and which may, but do not necessarily, involve the trial process since they may be settled prior to the actual court proceedings. The term *represented cases* refers to those cases which involve the attorney-client relationship. A represented case may be settled prior to filing suit, settled after the filing of suit but before trial, or it may actually go to trial.

[3] *Supra* note 1.

in the accident. These relationships are legitimated in the formal law, and the factors are specifically identified as conditions for payment in Acme's training materials and rule books. Representation, on the other hand, is not treated by the formal law or by official company policy as a factor to increase the value of a claim. Juries are not to consider attorneys' fees in computing an award,[4] and Acme's executives declare opposition to any increment in payment in represented cases. On the other hand, many adjusters acknowledge paying more in represented cases, and this situation has been cited both in nonempirical commentaries and in the few empirical studies that have been made of bodily injury claims payments.[5] With this contradiction in mind, the Acme files were analyzed according to whether or not an attorney was present. Other analyses, not reported here, concerned such matters as age, sex, and race of the claimant, and employment status of the defendant.

I. REPRESENTATION AND RECOVERY

Apart from liability and damages, representation was found to be the most important single factor accounting for payment. Although it is formally irrelevant to the worth of a claim, and is denied or minimized in discussion by most insurance company executives and by many adjusters, the presence of a lawyer is nonetheless a major influence on the outcome of bodily injury claims.

A first glimpse at the effect is provided by Table 1, which shows the average recovery of represented claimants to be from 5 to 20 times as high as that of unrepresented claimants. Although some of this apparent advantage is spurious — related to the kind of claims that attorneys agree to represent — the fact remains that at every level of damages and liability, the outcome in a represented case is likely to be more favorable to the claimant than the outcome in an unrepresented case. This fact is documented in Table 2, which shows the recovery in represented and unrepresented claims with a simultaneous control for liability and injury. The judgment concerning liability and injury was made for each case by coders, who looked mainly at the accident configuration to determine apparent liability, and at medical reports and statements to determine injury.

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[4] *See,* Atlantic Coastline R. Co. v. Brown, 93 Ga. App. 805, 92 S.E.2d 874, 876 (1956). *Compare,* 25 C.J.S. *Damages* § 50 (in some jurisdictions attorneys' fees may be considered in estimating the amount of damages where an award of exemplary damages is authorized, — *e.g.,* in cases of "gross negligence").

[5] *See,* A. CONRAD, J. MORGAN, R. PRATT, JR., C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS, 181 *et. seq.* (1964); Franklin, Chanin & Mark, *Accidents, Money, and Law: A Study of the Economics of Personal Injury Litigation,* 61 COLUM. L. REV. 1, 16-20 (1961).

Table 1. Recovery and representation.

Type of Representation	All Cases		Paid Cases Only	
	Number	Mean Recovery	Number	Mean Recovery
Unrepresented	1601	$ 254	950	$ 427
Solo attorney, non specialist	471	$1499	390	$1810
Firm attorney, non specialist	70	$2226	59	$2641
Specialist (NACCA)	74	$4815	70	$5090

Table 2. Recovery and representation with control for apparent liability and injury.

	Liability Likely		Liability Unlikely	
	Injury Moderate, Severe or Fatal	Injury Minor	Injury Moderate, Severe or Fatal	Injury Minor
Percent represented	60%	29%	53%	20%
Percent recovering				
Unrepresented cases	79%	69%	61%	42%
Represented cases	93%	92%	81%	62%
Mean (average) recovery in paid cases				
Unrepresented	$ 1652	$ 329	$5769	$235
Represented	$11,603	$1438	$1655	$763
Total cases with information available	94	1350	49	723

The top line of Table 2 indicates that representation is a function of both liability and damages, but that damages are the more important factor. When injuries are moderate, severe, or fatal, more than half the cases are represented, even with unlikely liability on the part of the defendant; in fact, diminished liability reduces representation only by 7 percent. On the other hand, minor injury even combined with likely liability is represented in only 29 percent of the cases.

Table 2 shows that in every liability-injury category the *proportion* of claimants recovering some award is considerably higher when the claimants are represented. The advantage of the represented claimant in terms of chance of recovery is not eliminated by unlikely liability. The table also shows considerable advantage in terms of *average* settlement for all paid claims, in all categories except the one embracing unlikely liability and serious injury. In this category the median[6] payment still shows a difference in the expected direction — $1125 for the represented as compared with $500 for the unrepresented — but the mean is affected by the small number of paid cases (14) and the presence of two extraordinary settlements in this group: one for $61,000 and the other for $11,000.

[6] The "median" payment refers to that figure exceeded by 50 percent of the payments and in turn greater than 50 percent of the payments. The "mean" payment refers to that figure which is the arithmetic average of all payments. Where there are very few cases in a particular category, the "mean" figure may be distorted by unusually high or unusually low figures.

An additional tabulation, controlling for size of known economic loss (special damages) indicates that the average recovery in represented cases is roughly double or triple that in unrepresented cases, and furthermore that attorneys recover in 41 percent of cases in which special damages are either totally absent or unknown, as compared with 24 percent of the unrepresented claimants in this situation.

The facts reported in this section suggest that there is some value accorded to claims merely because of representation. This situation is understandable, less in the light of the attorney's knowledge of the formal law, than in the light of his negotiation power.[7] Were knowledge of formal law the cue to the attorney's advantage, one might expect the advantage to weaken proportionately as the case became weaker in formal law; but the facts are that the represented claimant has as great an advantage over the unrepresented claimant in cases where liability is weak and injury is insignificant as in cases where liability is clear and injury is significant. On the other hand, negotiation power is present throughout the range of liability and injury combinations. The attorney, as compared with the unrepresented claimant, understands the rules of negotiation; he knows that payment will be made on a danger or nuisance value basis in nearly any bona fide claim, providing the insurance company believes that the claim will be pressed, and the attorney can threaten to take any claim to court. He may also credibly threaten to accumulate testimony favorable to liability and to accentuate the extent of any injury. Moreover, an attorney in accepting a case, has the advantage of a tacit commitment: both he and the insurance adjuster know that his (the attorney's) business and reputation would be threatened by a trivial settlement or a denial. This knowledge lends additional credibility to the attorney's threats, and makes these threats and rationalizations more effective tools in securing a higher settlement for almost any given claim.

To this point I have been concerned with the effects of representation on recovery. To continue, I would like to consider some prior correlates or causes of representation. Table 2 and Table 4 below suggest a correlation of representation with size of loss or injury. Although part of this correlation may be explained as manipulation of the facts concerning a given claim by the attorney,

[7] Negotiation power will be discussed in more detail in Chapter 4 of SETTLED OUT OF COURT, *supra* note 1. The principal techniques or "plays" in the negotiation "game" are: proposals, which serve as a cue to the expectations of each side; rationalizations, which legitimate proposals in terms of agreed general principles; threats and promises, stating consequences of particular choices; and commitments, which bind a party more convincingly to his proposals, rationalizations, and threats. Negotiation power refers to the ability to use these techniques in a sophisticated and successful fashion. *See,* CARL M. STEVENS, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION (1963).

I believe that the bulk of the association is due to the inclination of claimants with higher losses to seek representation, and to the greater willingness of attorneys to accept claims with larger losses and thus potentially larger recoveries.

Representation is also shown, in Table 2, to be greater when liability is likely, although this relationship is smaller than with degree of injury. The Acme files show lawyers accepting some proportion of claims even when liability is most doubtful, but the proportion here is small. Where claims with unlikely liability are accepted by lawyers, the results are generally more favorable than in similar unrepresented claims, again indicating the existence of bargaining power unavailable to the unrepresented claimant.

Two additional relationships with representation can be shown with other data. Table 3 shows the relationship between representation and recovery controlling for size of city, and shows clearly that representation is strongly related to the urbanization of the jurisdiction. The proportion of claims represented in the large central cities is double that in small cities or in the countryside, and this in turn can probably be explained by the relative sophistication and wariness of the city-dwellers. On the other hand, the proportion of claimants that recover does not fluctuate much in this instance, and the average settlement in represented paid cases actually declines with increasing urbanization. This apparent paradox is most likely explained by the inclusion of larger numbers of small cases and cases of tenuous liability in the total mix accepted by the urban lawyers. The small town and country lawyers probably deal with a more selected group of cases. The higher payments on unrepresented claims in the more urbanized jurisdictions are in accord with general expectations concerning the effect of city size on claims; however, the effect is not as drastic or as uniform as one might have thought prior to viewing the data.

Table 3. Recovery and representation with control for size of city.

	City Size				
	SMSA* More Than 1 Mill		SMSA Less Than 1 Million	Other Urban	Rural
	Central	Ring			
Percent represented	38%	33%	21%	16%	19%
Percent recovering					
Unrepresented	61%	58%	60%	58%	57%
Represented	81%	90%	87%	90%	85%
Mean recovery in paid cases					
Unrepresented	$ 576	$ 344	$ 405	$ 386	$ 326
Represented	$1422	$2452	$2609	$4891	$2697
Total cases with information available	698	383	576	268	136

*Standard Metropolitan Statistical Area

Finally, representation is related to the type of claimant, in particular to whether the claimant is Jewish or Gentile, as measured by surname. Claimants with Jewish names were found far more likely to be represented than others (59 percent as opposed to 26 percent for other whites). The probability of their receiving any award, however, was somewhat lower (77 percent as opposed to 84 percent, respectively). The explanation for the lower recovery of represented Jewish claimants is probably identical to that for the relationship with urbanization — the larger number of Jewish claims represented must have included some less meritorious claims. No differences were found in representation by age or sex of the claimant, and an attempt to investigate race was abandoned because of the unsatisfactory state of the data concerning Negroes.

In sum, representation is unequally distributed in the population of claims: large claims, claims with apparent liability, claims of metropolitan residents, and claims of Jews are instances of categories where representation is relatively high. Although groups with high proportions of represented cases may experience a somewhat smaller proportion of paid claims, the level of payments in represented claims is considerably higher than in unrepresented claims, regardless of the fact that the official policy of the company and the formal law are both to the contrary.

II. NEGOTIATION, SUIT, TRIAL, AND RECOVERY

As far as the actual negotiation of claims is concerned, the meaning of filing suit is ambiguous. On its face, this act may be seen as a sign of incipient failure of the negotiation: the attorney for the claimant prepares for an expected trial. Another interpretation is that filing suit is a move in the game of negotiation: it establishes the credibility of a threat to go to trial, but relies on a long delay between the filing of suit and the setting of trial to produce a negotiated settlement. This interpretation seems to me most satisfactory for the bulk of suit cases observed. The filing of suit may also be required to preserve the legal basis for the claim, and thus to continue negotiation when the statute of limitations threatens to bar the claim. Finally, it is the practice of some attorneys, particularly in urban areas with long delays in trial calendars, to file suit as a routine matter, regardless of their confidence that a settlement will take place. The latter procedure is also reputed to be encouraged by contingent fee agreements that provide a higher share for the attorney in sued cases.

The bringing of a case to trial is a less ambiguous indication of failure of negotiation. Even though many cases brought to trial may settle during the course of trial, major processing costs are assumed by both parties. Since a principal benefit of the negotiated settlement is the mutual avoidance of these costs, a conclusion of at least partial failure of negotiation is unavoidable. In this section data will be presented concerning recovery in tried cases as compared with those settled prior to trial, and reasons will be suggested as to why these failed to be settled out of court. There were too few cases brought to trial to make distinctions among them, and these cases will be treated together with those cases that settled during trial (23 percent), and those that went to verdict (72 percent), and those that were appealed (5 percent).

Table 4 presents a summary picture of proportions of cases entering the successively more advanced stages of the legal process, and indicates the recoveries in each stage.[8] The columns control for known economic loss. The table shows first, that except where special damages were nil, or unknown, there was recovery in more than 90 percent of the total cases. Reading down the table we find that the proportion of claimants recovering *decreases* with every advance towards trial, from representation to suit to trial itself. With the minor exception of a tie in the first column, this finding holds in every category of damages. In apparent opposition to this finding, the average recovery of those who receive anything increases with representation and suit. This increase does not, however, continue to include the step of trial. Although the number of cases on which the trial figure is based is very small, the fact that a decrease is observed in three of the five categories marks this step as a distinct departure from the observed trend.

Reading across the table, the proportion recovering at different levels of damages is quite low where damages are nil, and fairly uniformly high in all other categories, whether one speaks of total cases, represented cases, or sued cases. In marked contrast, tried cases show a rather steady increase in proportion of recovery, from extremes of 15 percent where damages are nil or unknown to 71 percent where they exceed $500. A similar steady increase is seen in the proportion of cases reaching successive stages in the legal process, as damages increase.

[8] *Supra* note 2.

Table 4. Recovery according to representation, suit and trial, controlling for damages.

	Special Damages				
	0 or Unknown	$1 - $50	$51 - $200	$201 - $500	$500+
Total cases —	867	395	450	258	246
Percent recovering	25%	92%	92%	91%	95%
Mean payment, paid cases	$ 87	$123	$374	$ 911	$4453
Represented cases —	75	67	186	135	152
Percent of total	8.7%	17.0%	41.3%	52.3%	61.8%
Percent recovering	41%	90%	90%	89%	93%
Mean payment, paid cases	$579	$247	$546	$1166	$5916
Suit cases —	39	40	104	72	122
Percent of total	4.5%	10.1%	23.1%	27.9%	49.6%
Percent recovering	41%	83%	85%	85%	90%
Mean payment, paid cases	$632	$265	$564	$1258	$6736
Trial cases —	13	6	20	20	34
Percent of total	1.5%	1.5%	4.4%	7.8%	13.5%
Percent recovering	15%	17%	35%	55%	71%
Mean payment, paid cases	$1172	$8.00*	$449	$1289	$4655

*Based on fewer than 10 cases.

Support is given to the established generalization that large cases go to trial more frequently. Tried cases are nevertheless a distinct minority of the large cases, and there must be something special about them.

Even disregarding processing costs, trial does not seem to yield systematically larger net recoveries than representation alone. With respect to the proportion of claimants recovering, it is considerably worse.

These findings do not appear to be explainable by simple principles other than tautological statements such as: cases which go to trial are those that could not be settled, or are those on which agreement as to evaluation was impossible. However, I am willing to speculate concerning these findings, basing my thoughts on my interviews and observations.

A first factor that may result in trial is the presence of zero special damages per se.[9] A claimant without medical bills or lost wages has very little with which to interest an insurance company, other than his signature. The latter alone is worth something, *i.e.*, nuisance value, but the amount that an adjuster can pay in that category is too small to buy off a represented case. Many of these cases may verge on the fraudulent, or at best represent noncom-

[9] Where damages are nil or unknown, a high proportion of represented and sued cases go to trial. This finding may be partly an artifact of the data: claims denied early in their history may produce a file without any indication as to damages, although serious injury may have been involved along with very doubtful liability. The following discussion assumes that, allowing for this artifact, there remains some overrepresentation of zero damages cases among all tried cases.

pensable damages to dignity. Others may involve a genuine hurt, but injuries in the absence of bills do not impress the bureaucratic supervisory structure within which an adjuster works. It will be noted that few of these cases are represented, but an attorney accepting a case makes a tacit promise to secure more than nuisance value, and this frequently sends him to the courtroom. The wisdom of the companies in opposing this type of claim is borne out by the low proportion of recoveries in this category, yet the relationship between the attorney and his client may make trials of these cases inevitable.

A different situation may be involved in many claims with high special damages. Very serious claims are supervised not only at the local level, but also at the regional or even home office levels of a company. It is not only the adjuster who has to justify his evaluation to a supervisor, but the supervisor in turn must justify a joint evaluation to one or more higher executives. The understandable tendency in this situation is to be very conservative in evaluation. Moreover, where much is at stake, assumption of processing costs inherent in trial is easier, because these costs become trivial compared to the potential verdict. Trial in this case may serve a bureaucratic function. A supervisor may recriminate with his subordinate if he disagrees with the reasonableness of the latter's negotiated settlement. He cannot disagree with a subordinate's payment of a judgment ordered by a court. In this situation, trial may be a way of preserving the bureaucratic structure of the insurance company. Support for this interpretation comes from the fact that a relatively high proportion of tried cases in the highest bracket of damages do recover, and with an average payment higher than the figure for total cases, albeit the figure is lower than that for represented cases as a whole.

Another principle can be deduced from Table 5, which introduces the simultaneous control for injury and liability. It is seen in this table that trial is more related to injury than to liability; in fact, more cases weak than strong on liability are tried. Resistance to cases of weak liability might reasonably be expected from the companies, but why should lawyers press these cases? The answer may be related to the type of gamble offered by these cases of weak liability. It is precisely where liability is weak and injury is moderate or severe that the highest proportion of cases go to trial. It is in these cases that the danger value rule[10] operates, and the adjuster

[10] In cases with liability unfavorable to the claimant, but with bad injury, Acme's policy is to permit local offices to offer somewhere in the neighborhood of ten percent of "full value" as a compromise payment. This is termed danger value, the reference being to the possibility of a high award if the case manages to get to a jury despite apparent nonliability.

is legitimately able to offer compromise payments. However, the offers in these circumstances may appear trivial both in the light of expenses borne by the claimant and in the light of possible recovery if the liability barrier can be passed. Heavy expenses on the part of the claimant mean that a considerable sum must be offered merely to pay existing bills and the attorney's fees. In the extreme, as in one case observed, if no payment is forthcoming the bills will simply go unpaid. The case in question involved a woman of 60 whose income was $30 per week and whose life savings were $900. Her medical bills exceeded $4,000. This woman would be no better off personally with a settlement for medical expenses than with no settlement at all. For this reason, the adjuster declined to make any offer. In contrast, even with one chance in 10 of getting to a jury in such a case, it might be worthwhile to the lawyer to press for trial, since at least one significant recovery might be expected in the course of many trials.

Table 5. Recovery in tried and untried cases, controlling for liability and injury.

	Liability Favorable to Claimant		Liability Unfavorable to Claimant	
	Injury Mod. or Ser. (N-94)	Injury Minor (N-1333)	Injury Mod. or Ser. (N-49)	Injury Minor (N-716)
Percent tried	12.8%	3.0%	16.3%	4.6%
Percent recovering				
Untried cases	88%	76%	78%	47%
Tried cases	88%	63%	38%*	21%
Mean recovery in paid cases				
Untried cases	$ 7288	$ 660	$3565	$380
Tried cases	$12,847*	$2990	$ 483*	$521*

*Based on fewer than ten cases.

A final principle, relevant to the whole range of cases, may be deduced from the example in Table 6. Where the case is complicated, trial may be necessary because the negotiation task becomes too complex. The example here is additional defendants, as would result, for instance, from a multiple-car collision. In this instance, agreement as to liability and damages is required from a larger number of parties. Over four times as many cases go to trial where there is more than one defendant. Whether tried or untried, claims in which there is more than one defendant are paid much less often, doubtless because Acme's insured is sometimes only peripherally involved.

Table 6. Trial, recovery and multiple defendants.

	Number of Defendants	
	One Only (N-1648)	More Than One (N-544)
Percent tried	2.6%	10.6%
Percent recovering		
Untried cases	74%	48%
Tried cases	86%	25%

SUMMARY

This research has confirmed the generalization that big cases go to trial, which I believe to have been the only generalization of this nature to have appeared in the academic literature. However, inspection of the Acme files shows that even among cases with large losses only a small proportion goes to trial, and among those cases with negligible losses a surprisingly large proportion is tried. A closer look at the data suggests some additional principles accounting for trial; trial may occur disproportionately in cases which, lacking bureaucratically acceptable accounts, cannot justify a significant offer from the bureaucracy. It occurs in cases where the stakes are so high as to make processing costs inconsiderable, and in these cases it helps to protect the supervisory structure of the company bureaucracy. It occurs where it presents a long-shot chance of a very high judgment as a choice counter to a very low settlement, in which case the utility of the small sum would seem to be negligible. Finally, it occurs in cases that are more complex, involving difficult fact situations or numerous negotiators, where agreement on a definitive allocation of costs and responsibilities is harder to obtain.

TAXATION OF TRUSTS: WHEN DOES A TRUST TERMINATE FOR FEDERAL INCOME TAX PURPOSES?

BY ROLF A. HANNING*

With the increased popularity of financial planning by means of a trust, taxation problems become more complex and more important to lawyers in this area. Dealing with a vital facet of trust taxation, the author thoroughly explores the history of the principles of termination of trusts for taxation purposes, citing relevant regulations and tax decisions. He concludes that a trust terminates at the earlier of these two events: 1) The time when the trust assets have actually been distributed or 2) The expiration of a reasonable period for distribution.

"A trust does not automatically terminate upon the happening of the event by which the duration of the trust is measured."[1]

INTRODUCTION

THIS article attempts to shed some light on the question: When does a trust terminate for federal income tax purposes? Before proceeding further, however, it is appropriate to answer yet another question: Why is it important to know exactly when a trust terminates for tax purposes?

Subchapter J of the *Internal Revenue Code of* 1954 imposes an income tax on trusts.[2] It also provides that trusts have income,[3] deductions,[4] and exemptions.[5] It can therefore be concluded that trusts are taxable entities. This article will not treat in detail the various income tax problems incident to the termination of a trust, since these problems have been the subject of comprehensive analysis by various competent authors.[6] Let it suffice here to merely point

* Lt. Col. USAF; Operations Staff Officer, Headquarters USAF; B.S., Newark College of Engineering, 1953; M.S. The George Washington University, 1964; J.D. University of Denver, 1968; Member of Colorado Bar.

[1] Treas. Reg. § 1.641(b)-3(b) (1956).

[2] INT. REV. CODE of 1954, § 641.

[3] *Id.* § 641.

[4] *Id.* § 642.

[5] *Id.* § 642(b).

[6] Comm. on Modification, Revocation and Termination of Trusts, *Termination of Trusts: Trustee's Problems in Winding Up*, 1 REAL PROP., PROB. & TRUST J. 514 (1966); Glassmoyer, *Termination Problems of Estates and Trusts: Capital Gains: Carryover of Tax Benefits Upon Distribution*, N.Y.U. 17TH ANN. INST. ON FED. TAX. 1227 (1959); Littenberg, *Techniques for Controlling Income Tax Consequences of Estates and Trusts*, 45 TAXES 206 (1967); Lowell, *Carryover of Unused Losses and Excess Deductions to Beneficiaries on Termination of Trusts and Estates*, 48 A.B.A.J. 1087 (1962); Rea, *The Fiduciary's Final Return*, 21 J. TAXATION 350 (1964); Somers, *Some Income Tax Problems Incident to the Termination of a Trust*, 14 TAX L. REV. 85 (1958); Tomlinson, *Tax Carryovers on Termination of Trusts and Estates*, N.Y.U. 20TH ANN. INST. ON FED. TAX. 267 (1962).

out some of the more important reasons for being concerned with the termination date of a trust.

The first reason is that the trust instrument itself does not necessarily control the exact termination date for tax purposes. Assume, for instance, a trust with income to the grantor's wife for her life, and upon her death the corpus to go to the grantor's children. As will be explained, such a trust will not necessarily terminate for tax purposes exactly on the date of the life income beneficiary's death. Thus, the question of the termination date is neither simple nor clear cut.

Secondly, since it is a taxable entity, a trust can be an income splitting device resulting in tax savings. This could be true of a trust which is accumulating income, for under the proper circumstances, the trust, and not the ultimate beneficiary would be taxed on the income accumulated by the trust.[7] This income splitting benefit will come to an end when the trust terminates as a taxable entity. It is also possible for a "simple" trust,[8] which has been distributing all its current income and has been paying little or no taxes,[9] to become a "complex" trust[10] and therefore an income splitting device during the termination process. Assume again a trust with all income to be currently distributed to the grantor's wife for her life, and upon her death the corpus to go to the grantor's children. Such a trust would operate as a pure conduit in regard to ordinary income during the life of the income beneficiary who would be taxed on the income of the trust.[11] Upon her death, however, there might be a change in the nature of the trust. If state law or the trust instrument required the trustee to accumulate the income accruing after the death of the life income beneficiary, and to pay this income out in one sum together with the principal, there would be created a complex income accumulating trust and income splitting device. It would come into being upon the happening of the trust duration measuring event, the death of the life income beneficiary, and would continue to exist until the trust terminated for income tax purposes,[12] which might not happen for some time. Thus, the question of when the income splitting benefit terminates is not only important for complex trusts; it may also be important in cases of simple trusts which turn into complex income accumulating trusts during the termination process.

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[7] INT. REV. CODE of 1954, §§ 641-43, 661-63.

[8] *See* INT. REV. CODE of 1954, § 651(a) and Treas. Reg. § 1.651(a)-1 (1956) for a definition of a "simple" trust.

[9] Because of the deduction allowed by INT. REV. CODE of 1954, § 651.

[10] Trusts which accumulate income or distribute corpus are called "complex." Treas. Reg. § 1.661(a)-1 (1956).

[11] INT. REV. CODE of 1954, § 652.

[12] Treas. Reg. §§ 1.641(b)-3(c), 1.651(a)-2 (1956).

The allocation of deductions is a major reason for concern over an accurate determination of how long the trust continues to exist for tax purposes. If, *upon termination,* a trust has an unused net operating loss carryover or excess deductions for its last taxable year, such carryovers or excess deductions are allowed as deductions to the beneficiaries who succeed to the property of the trust.[13] Since the excess deductions are only allowable to the beneficiaries in the year of termination,[14] it is vital that the trustee be certain of the exact time of termination for tax purposes, so that the winding up of the trust can be planned and accomplished with maximum benefit from deductions. Thus, the question of when a trust terminates can substantially affect the tax liabilities of the various beneficiaries. For this reason, it is understandable that the question has been repeatedly treated in periodical legal literature.[15]

I. LEGISLATIVE, STATUTORY, AND QUASI-STATUTORY PRONOUNCEMENTS

Trusts were taxable well before 1954.[16] However, the question of when a trust terminates for tax purposes was not addressed in the *Internal Revenue Code of* 1939, not even in section 161, the predecessor of the present section 641 which imposes the tax on trusts under the 1954 *Code.* Although the regulations under the 1939 *Code* addressed the duration of estates for tax purposes,[17] they did not define the termination of trusts.[18]

Congress gave the question of trust termination some thought before enacting the 1954 *Code.* The reports of the House Ways and Means Committee and the Senate Finance Committee of H.R. 8300, which became the 1954 *Code,* contain the following statement:

> The determination of whether a trust has terminated so that the provisions of this subchapter no longer apply depends on whether the property held in trust has been distributed to the persons entitled to succeed to the property upon termination of the trust rather than upon the technicality of whether or not the trustee has rendered his final accounting.[19]

The 1954 *Code* itself, however, does not expressly address the question of when trusts terminate for tax purposes. The question is

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[13] INT. REV. CODE of 1954, § 642(h).

[14] Treas. Reg. 1.642(h)-2(a) (1956).

[15] Camilli, *When Estates and Trusts Terminate,* 99 TRUSTS & ESTATES 370 (1960); Glassmoyer, *supra* note 6; Lowell, *supra* note 6; Somers, *supra* note 6.

[16] INT. REV. CODE of 1939, § 161.

[17] Treas. Reg. 118, § 39.162-1(g) (1956).

[18] *Id.* §§ 39.161-1 — 39.163-1 (1956).

[19] H.R. REP. No. 1337, 83d Cong., 2d Sess. A191-92 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 340 (1954).

not answered in section 641 which imposes the tax on trusts, nor is trust termination among the definitions of section 643. No enlightening reference to trust termination is to be found in all of subchapter J.[20] However, the regulations under the 1954 *Code,* unlike those under the *Code* of 1939, address the question of trust termination in some detail.[21]

According to the regulation, "reasonable" time is permitted for administration,[22] and winding up cannot be "unduly postponed,"[23] nor can distribution of corpus be "unreasonably delayed."[24] This all amounts to one general qualification exempting cases of unreasonable delay *in distribution* from the general rule that a trust terminates when the property has been distributed. While the regulation also mentions administration and winding up in these qualifying sentences, it can be shown that it is really only the delay in distribution which counts.

The winding up of a trust has two aspects. The trustee takes some steps to assure his discharge from further liability. This is the aspect of accounting which, *by itself,* does not control termination for tax purposes. All the other steps of winding up are somehow related to the second aspect — distribution of the corpus — and affect the time at which distribution is accomplished. This aspect may include management tasks and tax or other litigation to preserve

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[20] INT. REV. CODE of 1954, §§ 641-692.

[21] Treas. Reg. § 1.641(b)-3(b) (1956) provides:

> Generally, the determination of whether a trust has terminated depends upon whether the property held in trust has been distributed to the persons entitled to succeed to the property upon termination of the trust rather than upon the technicality of whether or not the trustee has rendered his final accounting. A trust does not automatically terminate upon the happening of the event by which the duration of the trust is measured. A reasonable time is permitted after such event for the trustee to perform the duties necessary to complete the administration of the trust. Thus, if under the terms of the governing instrument, the trust is to terminate upon the death of the life beneficiary and the corpus is to be distributed to the remainderman, the trust continues after the death of the life beneficiary for a period reasonably necessary to a proper winding up of the affairs of the trust. However, the winding up of a trust cannot be unduly postponed and if the distribution of the trust corpus is unreasonably delayed, the trust is considered terminated for Federal income tax purposes after the expiration of a reasonable period for the trustee to complete the administration of the trust. Further, a trust will be considered as terminated when all the assets have been distributed except for a reasonable amount which is set aside in good faith for the payment of unascertained or contingent liabilities and expenses (not including a claim by a beneficiary in the capacity of beneficiary).

The above provision was promulgated by the Treasury in 1956 together with some rules concerning the duration of estates under the heading "§ 1.641(b)-3 Termination of estates and trusts." The provision quoted above concerning the time that a trust terminates has remained unchanged since its promulgation in 1956.

[22] Treas. Reg. § 1.641(b)-3(a) (1956).

[23] *Id.*

[24] *Id.* § 1.641(b)-3(b) (1956).

the property so that it can later be distributed. It may entail sales or other transactions to make the corpus suitable for dividing among the various remaindermen. A trustee may have to perform certain tasks in preparation for distribution, and all fall within the headings of winding up and administration. But if there are any problems in this second aspect, they all manifest themselves eventually by a delay in distribution of the corpus to the remainderman. The various administrative actions and omissions of the trustee constitute the causes for the manifestation — delay in distribution. From a pragmatic viewpoint, it is also apparent that it must be a delay in distribution which takes a case out of the general rule, not a delay in "administration" or "winding up." Once the property has been distributed to the remaindermen, they are taxable on the income from the property which they now own. This is really all the Treasury is concerned about.

Another way to arrive at the exact meaning of the first qualification to the general rule is to examine the regulation text by itself. The first sentence of section 1.641(b)-3(b) states the general rule that a trust terminates for tax purposes when the corpus has been distributed. The second sentence merely states what is obvious from the general rule — that a trust does not automatically terminate for tax purposes upon the happening of the measuring event, such as the death of the life beneficiary. The trust cannot automatically terminate at that time, since the general rule provides that the trust does not terminate until the property has been distributed. The third and fourth sentences grant a reasonable time for administration and winding up. Not until the fifth sentence is there any qualifying language which indicates when a case is to be exempted from the general rule. The qualifying statement is: "if the *distribution* of the trust corpus is unreasonably delayed, the trust is considered terminated for Federal income tax purposes . . . ."[25] Thus, the first qualification to the general rule, that a trust terminates when the corpus has been distributed, is that an unreasonable delay *in distribution* will take the case out of the general rule. This qualification does not appear in the committee reports. However, a subsequent analysis of case law will show that the Treasury was justified in making this qualification, which is merely a restatement of a qualification adopted by the courts when they interpreted the basic rule.

The second qualification adopted by the Treasury is found in the last sentence of the regulation paragraph on trust termination. It provides that a trust will be considered terminated for tax purposes

[25] *Id.* (emphasis added).

even though some assets have not been distributed, provided the assets retained by the trustee are only a reasonable amount set aside in good faith for payment of unascertained or contingent liabilities and expenses, not counting claims by beneficiaries.[26] This can be explained as a clarification of what constitutes trust property or corpus for purposes of trust termination — in other words, it is a clarification of the basic rule. If so viewed, this qualification simply takes amounts equalling unascertained liabilities and expenses out of the category of corpus or trust property as used in the basic rule. Another explanation of this qualification is that it is a definition of substantially complete distribution, under the theory that substance rather than form controls tax consequences. Regardless of which view is preferred, the Treasury would be justified in adding such a clarification or definition without departing from the confines of legislative intent.

Summary of Statutory Law

The sum total of legislative, statutory, and quasi-statutory pronouncements on the question of trust termination consists of the committee reports and one Treasury Regulation paragraph. The committee reports state the basic rule that a trust terminates for tax purposes when its property has been distributed. The regulation repeats the basic rule and makes two exceptions:

(1) Unreasonable delay in distributing the trust property will cause the trust to be treated as terminated after expiration of a reasonable period for distribution.

(2) Distribution is considered completed for trust termination purposes even though the trust still retains a reasonable amount of assets set aside in good faith to meet unascertained or contingent claims and expenses, not counting claims by beneficiaries as such.

II. Case Law

Eighteen cases were found directly in point on the question of when a trust terminates for tax purposes, excluding appeals and two cases in point but representing a theory later universally rejected. Since the periodical legal literature does not anywhere provide a comprehensive listing of all trust termination decisions, and the major reference works cite only selected cases,[27] it seems appropriate to provide a chronological listing of all decisions which were based

[26] *Id.*

[27] *See* 3 P-H 1969 Fed. Taxes § 28,025; 3 CCH 1969 Stand. Fed. Tax Rep. § 3605.71; 6 J. Mertens, Jr., Law of Federal Income Taxation § 36.22 (1968).

on the precise question of when a trust terminates for tax purposes.[28]

In the following discussion, the term "measuring event" will be used repeatedly. It means the "event" in the second sentence of the regulation paragraph on trust termination: "A trust does not automatically terminate upon the happening of the *event* by which the duration of the trust is measured."[29] The measuring event is the time at which the trust instrument calls for the trust to terminate. For example, if a trust is for 10 years, the measuring event is the expiration date of the 10 year period. If the trust is for the life of an income beneficiary, the measuring event is his death. If the trust is to endure until the remainderman attains a certain age, the measuring event is the appropriate birthday. There are trusts with indefinite measuring events, such as a trust until the surviving spouse dies or remarries. Some trusts have provisions for flexibility in the measuring event. An example would be a trust for 10 years and for so long thereafter as the trustees agree, but no longer than the life of X. In terms of tax impact, the measuring event triggers the termination process, but does not actually terminate the trust for tax purposes. The reasonable time allowed for distribution is measured from the happening of the measuring event.

Before proceeding with the analysis of case law, it is necessary to explain what is meant here by a "decision in point" on the question of termination of trusts. There must have been, first, a valid trust for tax purposes.[30] Secondly, the decision must have hinged on the question of when or whether the trust terminated for tax purposes. It is not necessary that the court actually stated the termination question, as long as it was necessary for the court to consider the

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[28] O.D. 806, 4 CUM. BULL. 223 (1921); George M. Studebaker, 2 B.T.A. 1020 (1925); Minneapolis Trust Co., 13 B.T.A. 1069 (1928); Francis Francis, 15 B.T.A. 1332 (1929) (the ruling of this case was expressly rejected in *Della M. Coachman,* 16 T.C. 1432 (1951), after having been universally disregarded since 1939); Florence H. Fitch, 29 B.T.A. 1299 (1934) (since this decision relied upon *Francis,* it should be considered rejected along with *Francis* insofar as it pertains to termination of trusts); Russel v. Bowers, 27 F. Supp. 13 (S.D.N.Y. 1939); Willard C. Lipe, 41 B.T.A. 107 (1940), *aff'd* Commissioner v. First Trust & Deposit Co., 118 F.2d 449 (2d Cir. 1941); George S. Fiske, 45 B.T.A. 135 (1941), *aff'd* Commissioner v. Davis, 132 F.2d 644 (1st Cir. 1943); Leonard Marx, 47 B.T.A. 204 (1942); Trust of Bingham, 2 T.C. 853 (1943), *rev'd* Commissioner v. Kenan, 145 F.2d 568 (2d Cir. 1944), *rev'd* Trust of Bingham v. Commissioner, 325 U.S. 305 (1945); Edith M. Bryant, 14 T.C. 127 (1950), *aff'd* Bryant v. Commissioner, 185 F.2d 517 (4th Cir. 1950); Della M. Coachman, 16 T.C. 1432 (1951); Anstes Agnew, 16 T.C. 1466 (1951); Charles F. Neave, 17 T.C. 1237 (1952); Gamble v. United States, 116 F. Supp. 694 (E.D. Mo. 1953); Rev. Rul. 55-287, 1955-1 CUM. BULL. 130; Rev. Rul. 55-159, 1955-1 CUM. BULL. 391; Swoboda v. United States, 156 F. Supp. 17 (E.D. Pa. 1957), *aff'd* 258 F.2d 848 (3d Cir. 1958); Green v. United States, 6 Am. Fed. Tax R.2d 5647 (N.D. Tex. 1960); Lawrence O. Weston, 24 P-H TAX CT. REP. & MEM. DEC. 1439 (1965).

[29] Treas. Reg. § 1.641(b)-3(b) (1956) (emphasis added).

[30] 6 J. MERTENS, JR., LAW OF FEDERAL INCOME TAXATION §§ 35.21 — .27 (1968) contains a detailed discussion of what constitutes a valid trust for tax purposes.

question of whether or not the trust terminated for tax purposes to arrive at its decision.

A. *Cases Not in Point*

There are three cases which tend to confuse the issue because they have been cited or discussed in the context of trust termination, but are really not in point. In *Norton v. United States*[31] the remainderman took the corpus subject to a tax liability, and wanted to deduct interest accrued *prior* to the measuring event and termination. The argument concerned his right to the deduction. The time of termination was not an issue. The case of *J. B. Drew*[32] involved a question of the right to deduct trust expenses. The trustee agreed with the remainderman not to collect the corpus commission upon termination if the remainderman would pay the commission later. The remainderman unsuccessfully tried to deduct the commission on her personal tax return when she paid it in a later year. There was never any question of when the trust terminated for tax purposes. *Samuel v. Commissioner*[33] involved a grantor trust where the grantor-cotrustee-beneficiary attempted to amend the trust to make his interest in the income resemble an annuity. The grantor had to pay tax on the trust income, and there was no question of termination of a trust for tax purposes.

B. *Cases No Longer Followed*

There is one 1929 Board of Tax Appeals (B.T.A.) case, later rejected, which squarely treated a trust terminated as a tax entity upon the happening of the measuring event. In *Francis Francis*[34] the measuring event was the death of the life tenant. During the winding up process, the trustee sold some corpus stock at a capital loss. The remainderman claimed this loss as a deduction. The B.T.A. allowed the deduction to the remainderman, thus effectively treating the trust as terminated for tax purposes upon the happening of the measuring event. The rationale was that under local law the remainderman became at once entitled to the assets of the trust upon the happening of the measuring event, despite the trustee's nominal power to sell the corpus and distribute the proceeds. In 1951, the *Francis* decision was expressly rejected by the Tax Court, the successor to the B.T.A., in *Della M. Coachman.*[35] By that time, the

[31] 144 F. Supp. 425 (W.D. La. 1956), *aff'd* 250 F.2d 902 (5th Cir. 1958).
[32] 30 T.C. 335 (1958).
[33] 306 F.2d 682 (1st Cir. 1962), *aff'd* Archbishop Samuel Trust, 36 T.C. 641 (1961).
[34] 15 B.T.A. 1332 (1929).
[35] 16 T.C. 1432 (1951).

Francis theory had already been ignored in six cases decided between 1939 and 1950.[36]

In 1934, however, the B.T.A. still considered the *Francis* theory valid. In *Florence H. Fitch*,[37] the B.T.A. relied upon *Francis* as an alternate ground for its decision. Therefore, so much of *Fitch* as pertains to termination of trusts can be considered rejected along with *Francis*.

C. *The Measuring Event as a Control for Tax Purposes*

The fact that the trust does not automatically terminate for tax purposes upon the happening of the event by which the duration of the trust is measured does not mean that the measuring event can be totally disregarded for tax purposes. Taxpayers cannot simply treat the trust as terminated for tax purposes before the measuring event. Nor can the trust continue indefinitely once the measuring event occurs.

In *Minneapolis Trust Co. v. Commissioner*[38] the grantor created an irrevocable trust in 1911. In 1919, and before the measuring event, the grantor, trustees, and beneficiaries agreed to revoke the old trust, and to create a new one instead. The old trust was held to have continued for tax purposes. In *George M. Studebaker*[39] and *Weston v. Commissioner*,[40] the trusts were to continue as long as the trustees — who were also beneficiaries — agreed. In both cases the trusts owned businesses which sustained losses while being operated by the trusts. The trustees-beneficiaries tried, after the fact, to treat the trusts as terminated and to claim the losses as their own deductions. In the absence of any disagreement about continuing, both trusts were held to have continued as taxable entities.

The other side of the coin is illustrated by *Green v. United States*.[41] In addition to major provisions for the settlor's son, the trust instrument called for small periodic payments to certain servants. After the measuring event, and after distribution of the corpus, the remainderman attempted to treat the trust as continuing with respect to the servants. This was not allowed, and it was held that the trust did not continue for tax purposes after such distribution of the corpus.

In summary, the measuring event is a condition precedent — a necessity — to termination of an existing trust for tax purposes; and

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[36] *See* Edith M. Bryant, 14 T.C. 127 (1950); Trust of Bingham, 2 T.C. 853 (1943); Leonard Marx, 47 B.T.A. 204 (1942); George S. Fiske, 45 B.T.A. 135 (1941); Willard C. Lipe, 41 B.T.A. 107 (1940); Russel v. Bowers, 27 F. Supp. 13 (S.D.N.Y. 1939).

[37] 29 B.T.A. 1299 (1934).

[38] 13 B.T.A. 1069 (1928).

[39] 2 B.T.A. 1020 (1925).

[40] 24 T.C.M. 1439 (1965).

[41] 6 Am. Fed. Tax R.2d 5647 (N.D. Tex. 1960).

ultimate termination for tax purposes is an automatic, if only eventual consequence of the happening of the measuring event.

D. *Distribution as a Control for Tax Purposes*

While the measuring event controls whether or not there can be a termination, or must be a termination, it does not control the precise time of termination. This time is controlled by the distribution of trust corpus.

In *Anstes v. Agnew,*[42] the Tax Court denied the remainderman a deduction on her income tax return for a commission paid to the trustee out of the trust at the time of distribution, thus treating the trust as the proper taxpayer for deducting a commission paid during distribution. This means that a trust does not terminate for tax purposes until the assets have been distributed. One of the reasons for holding that the trust in *George M. Studebaker*[43] was still a taxable entity was that two $10,000 legacies had not been distributed by the trust. The fact that no assets had ever been distributed and that the title to trust property was still in the trustee was relied upon in *Weston v. Commissioner*[44] for finding that the trust had not terminated. The holdings in *Della M. Coachman*[45] and *Charles F. Neave*[46] were that trusts continue for tax purposes while the trustee still has duties to perform. In both cases, the only remaining substantive duty was distribution of corpus at a time when the trusts were held to be taxable entities.

An applicable Revenue ruling simply states that a trust continues for tax purposes during the period allowed the trustee under state law to distribute the assets.[47] The reference to local law is probably attributable to *Coachman* which relied in part on New York law to the effect that where a trustee is required to distribute the corpus, he is allowed a reasonable period to do so, and the corpus remains trust property during that period.[48] *Coachman* was then cited with approval in *Agnew* and *Neave* both of which preceeded the Revenue statement concerning local law. The impact of state trust law will be discussed further under "Reasonable Period for Distribution."

A further Revenue ruling concerns a trust which distributed installment obligations upon termination.[49] If the trust has been reporting its capital gain on the installment basis, the distribution can

[42] 16 T.C. 1466 (1951).
[43] 2 B.T.A. 1020 (1925).
[44] 24 T.C.M. 1439 (1965).
[45] 16 T.C. 1432 (1951).
[46] 17 T.C. 1237 (1952).
[47] Rev. Rul. 55-287, 1955-1 CUM. BULL. 130.
[48] 16 T.C. 1432, 1434-35 (1951).
[49] Rev. Rul. 55-159, 1955-1 CUM. BULL. 391.

be held to have been a disposition which accelerated capital gains to the trust. This theory is only possible if the trust is a taxable entity *during* distribution, and not only until distribution begins.

If distribution of trust property is to be the yardstick for determining when a trust terminates for tax purposes, it is not only necessary that trusts be held to endure at least until the assets have been distributed, it is also necessary that trusts be considered terminated as soon as distribution is or should have been completed. The necessary decision for this second element was provided in *Leonard Marx.*[50] There, a trust was held terminated for tax purposes when a reasonable time for distribution had elapsed, even though distribution had not been made. This would seem to imply that trusts are considered terminated at the time actual distribution is completed, if done within a reasonable time. This case also helps establish the point that trusts may terminate for tax purposes as to only part of their corpus under the same rules applicable to the termination of the entire trust.

There are, then, two types of decisions. One holds that a trust continues until assets have been distributed. The other provides that trusts will not continue beyond the date when distribution should have been accomplished. Between the two, they limit the possibilities of the termination time for tax purposes. In precise terms, the cases hold that a trust terminates at the earlier of the following two events:

(1) The time when the trust assets have actually been distributed.

(2) The expiration of a reasonable period for distribution.

If the possibility of unreasonable delay is ignored for the moment, a general rule can be stated: The determination of whether a trust has terminated depends upon whether the property held in trust has been distributed to the persons entitled to succeed to the property upon termination of the trust.[51]

Under the discussion of statutory and quasi-statutory law, it was asserted that distribution of corpus is the only true yardstick as to termination of trusts for tax purposes, and that all other aspects of winding up or administration are only relevant to the question of whether a delay in distribution is reasonable — but these aspects do not determine the time of termination by themselves. So far, the analysis of case law has only considered decisions which support this

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[50] 47 B.T.A. 204 (1942).

[51] This rule was developed by the courts between 1925 and 1952, as can be seen from the dates in notes 38 through 48. The rule was then enunciated in the Committee Reports in 1954, followed in two revenue rulings in 1955, and incorporated in the Treasury Regulation in 1956. *See* H.R. REP. No. 1337, 83d Cong., 2d Sess. A-191-92 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 340 (1954); Treas. Reg. § 1.641(b)-3(b) (1956).

proposition.[52] It is now necessary to reconcile with these distribution cases all other decisions in point.

E. *The Sales Aspect*

There are three cases[53] in which the trustees sold the trust property at a loss during the winding up process, but prior to distribution of assets to the remaindermen. In each case, the remaindermen tried to deduct the capital losses incurred by the trust on their personal income tax returns. In each case the remaindermen were denied this deduction, and the trusts were held to be the tax entities to the deduction. These decisions stand for the proposition that a trust endures for tax purposes *at least* until the sale of the trust property. They do not hold that trusts terminate after the trust property has been sold. Because of the precise tax question involved, it was not necessary to decide whether the trusts continued for tax purposes beyond the date of sale. In one of the three cases, *Swoboda v. United States,*[54] the district court expressly limited its holding by stating that the trust did not terminate until *at least* the day of sale. Since in all three cases the sale occurred before distribution, and since in all three cases the court held that the trust was in existence at the time of the sale but did not decide how long after the sale the trust would continue, these sales cases are not in conflict with the proposition that trusts terminate after the trust property has been distributed. The district court in *Russell v. Bowers,*[55] and both the district court and the Third Circuit in *Swoboda,* also relied upon applicable state trust law in reaching their decisions.

F. *The Accounting Aspect*

In *Edith M. Bryant,*[56] the Tax Court held that a final accounting rendered while the trust still holds property does not terminate the trust for tax purposes. This 1950 holding decisively eliminated accounting as the ultimate yardstick for defining the tax termination date of a trust, and is reflected in both the 1954 Committee Reports[57] and the 1956 Treasury Regulation.[58] The rule in no way conflicts with the proposition that distribution controls the termination time.

While it does not, by itself, control the time of termination, the aspect of accounting can have a profound effect upon distribution

[52] Florence H. Fitch, 29 B.T.A. 1299 (1934); Francis Francis, 15 B.T.A. 1332 (1929).

[53] Swoboda v. United States, 156 F. Supp. 17 (E.D. Pa. 1957), *aff'd* 258 F.2d 848 (3rd Cir. 1958); Gamble v. United States, 116 F. Supp. 694 (E.D. Mo. 1953); Russel v. Bowers, 27 F. Supp. 13 (S.D.N.Y. 1939).

[54] 156 F. Supp. 17 (E.D. Pa. 1957), *aff'd* 258 F.2d 848 (3d Cir. 1958).

[55] 27 F. Supp. 13 (S.D.N.Y. 1939).

[56] 14 T.C. 127 (1950), *aff'd* 185 F.2d 517 (4th Cir. 1950).

[57] H.R. REP. and S. REP., *supra* note 18.

[58] Treas. Reg. § 1.641(b)-3(b) (1956).

which, in turn, controls the time of termination. The Second Circuit recognized this in *Commissioner v. First Trust & Deposit Co.*[59] where it was held that it may not be unreasonable for a trustee to await the protection of a decree upon his accounting before making distribution, and that the trust continues for tax purposes during this wait. Thus, the aspect of accounting has a definite function in the law of termination of trusts for tax purposes: The need for an accounting may be relevant to the question of whether a delay in distribution was reasonable.

G. *The Duty or Purpose Aspect*

The courts have made statements to the effect that a trust continues for tax purposes while the trustee still has duties to perform, and in three of the "duty" cases the duty involved was the distribution of trust property. These three cases, *Coachman, Studebaker,* and *Neave* can, therefore, be classified as holding that a trust continues for tax purposes until distribution has been made.

In *Willard C. Lipe,*[60] the B.T.A. was confronted with an inter vivos trust which was to last until the death of both the grantor and his spouse. The trust instrument, however, placed a duty upon the trustee to pay the state and federal death taxes of the grantor. It took several years after the measuring event, and before distribution was effected, to finally determine and pay the grantor's federal and state death taxes. The B.T.A. treated the trust as continuing for tax purposes during this long period, and the Second Circuit affirmed, accepting the proposition that since one of the purposes of the trust was to pay the death taxes, the duration of the trust as a tax entity could properly be extended. The courts did not hold the trust to continue beyond the distribution date. The decisions, therefore, are not in conflict with the proposition that termination for tax purposes is controlled by distribution.

There are no cases which hold that a trust continues while the trustee still has *any* duty to perform — at least not as a broad proposition. The cases discussed above concern *major* duties of trustees in administration of a trust. In *Lipe,* the duty was to pay taxes for which the trustees would have been liable in part as the recipient of life insurance proceeds. Thus, *Lipe* can be explained as a case where tax problems delayed distribution and the delay was found to be reasonable.

H. *General Winding Up Aspect*

The discussion of case law has covered all but three of the pertinent decisions on the question of trust termination for tax pur-

[59] 118 F.2d 449 (2d Cir. 1941), *aff'g* Willard C. Lipe, 41 B.T.A. 107 (1940).
[60] 41 B.T.A. 107 (1940), *aff'd* 118 F.2d 449 (2d Cir. 1941).

poses. The first of the remaining three cases is a 1921 Treasury Office decision.[61] The trust provided for distribution of trust property one year after the life beneficiary's death. The decision treated the trust as a taxable entity for a period following the anniversary of the death.

In *George S. Fiske,*[62] it was held that the trust did not terminate for tax purposes the moment that the income beneficiary died, but that the trust was allowed a reasonable time to wind up.

The United States Supreme Court, in *Trust of Bingham v. Commissioner,*[63] held winding up expenses to be deductible by the trust. This theory necessarily requires the trust to endure as a taxable entity at least until the winding up expenses are incurred. It should be noted that the winding up, in this case as in most, consisted of distribution of corpus.

Thus, the winding up decisions hold that a trust does not automatically terminate upon the happening of the measuring event.

I. *Distribution of Trust Assets: The Determinant of Trust Termination Time*

In summary, the case law points to the conclusion that it is the time of distribution of the trust corpus which controls the exact time when a trust terminates for tax purposes. There are several cases which precisely so hold. None of the remaining cases in point, and not expressly rejected, conflict with the aforementioned rule: a trust terminates for tax purposes at the earlier of the following two events:

(1) The time when the trust assets have actually been distributed.

(2) The expiration of a reasonable period for distribution.

It now remains to be shown how administration and winding up aspects other than distribution affect, under the case law, the definition of a reasonable period for distribution.

J. *Reasonable Period for Distribution*

The case law on trust termination sheds very little light on what is a reasonable period for distribution. However, the qualifying rule that the actual distribution will not control the date of termination if there has been unreasonable delay in distribution was clearly stated as early as 1942 in *Leonard Marx.*[64] *Marx* also held that the reasonableness of the delay is a question of fact.[65] There are three other cases in which the courts expressly found no unreasonable delay;[66]

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[61] O.D. 806, 4 CUM. BULL. 223 (1921).

[62] 45 B.T.A. 135 (1941), *aff'd* 132 F.2d 644 (1st Cir. 1943).

[63] 325 U.S. 365 (1945), *rev'g* 145 F.2d 568 (2d Cir. 1944, *rev'g* 2 T.C. 853 (1943).

[64] 47 B.T.A. 204 (1942).

[65] *Id.* at 211.

[66] Charles F. Neave, 17 T.C. 1237 (1952); Della M. Coachman, 16 T.C. 1432 (1951); Edith M. Bryant, 14 T.C. 127 (1950), *aff'd* 185 F.2d 517 (4th Cir. 1950).

although this holding could be implied in any case which holds a trust not terminated. The cases with express reference to no unreasonable delay are of little help in establishing precisely what time is reasonable, because they were not close cases. The delays involved in the three cases were of only five (*Edith M. Bryant*),[67] six (*Charles F. Neave*),[68] and nine (*Della M. Coachman*)[69] months duration counting from the measuring event. All three involved an accounting, and in the case of the nine months delay, the trustee had to distribute to 50 remaindermen.

On the other hand, the delay in *Marx* was so obviously unreasonable as to be of little help in deciding other close cases. The trustee delayed for four years the distribution of part of the corpus to a beneficiary as to whom the measuring event — age 30 — had occurred.[70] The court found that the corpus could have easily been divided and distribution made. Thus, there is no express definition of a reasonable period for distribution in the case law on trusts. It is possible, however, to draw some conclusions concerning which factors are relevant to the question of reasonable delay.

1. Time

Time, by itself, does not appear to control the question of reasonableness of a delay in distribution. One trust was permitted to continue for tax purposes for at least six years after the measuring event.[71]

2. Accounting

It has been expressly held that a trustee may, under some circumstances, reasonably delay distribution until he is protected by a court decree upon his accounting.[72] The circumstances involved risky trust property in the form of mortgages and high tax liabilities. The delay was at least six years. There are three other cases involving an accounting and an express holding of no unreasonable delay; but the delays were comparatively short, all less than nine months from the measuring event.[73]

3. Taxes

It has also been held that trust termination may be delayed until

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[67] 14 T.C. 127 (1950), *aff'd* 185 F.2d 517 (4th Cir. 1950).

[68] 17 T.C. 1237 (1952).

[69] 16 T.C. 1432 (1951).

[70] Leonard Marx, 47 B.T.A. 204, 207 (1942).

[71] Willard C. Lipe, 41 B.T.A. 107 (1940), *aff'd* 118 F.2d 449 (2d Cir. 1941).

[72] Commissioner v. First Trust & Deposit Co., 118 F.2d 449, 452 (2d Cir. 1941).

[73] Charles F. Neave, 17 T.C. 1237 (1952); Della M. Coachman, 16 T.C. 1432 (1951); Edith M. Bryant, 14 T.C. 127 (1950), *aff'd* 185 F.2d 517 (4th Cir. 1950).

taxes are determined and paid, if the payment of taxes is one of the trust's purposes.[74]

4. Ascertaining Amount of Distribution

A trustee may have to wait until the end of a calendar or fiscal year before he can determine each beneficiary's ratable share of income. This was held to be a good reason for delaying distribution.[75] Under the same theory, a delay caused by any other bona fide problems in ascertaining distributive shares would seem to be sufficient excuse for delay.

5. Sales

The three decisions that trusts continue at least until the trust property has been sold[76] indicate that the need to make a sale of trust property, in order to be able to distribute the corpus in the manner prescribed, is sufficient to delay distribution. These cases, however, shed no light on how long the required sale may be postponed. In one case, the sale itself was the measuring event.[77] The other two decisions involved short periods of less than one year between the measuring event and the sale.

6. Dividing Corpus

The need to divide the corpus so that it could be distributed to some 50 remaindermen was a definite factor in holding a nine months delay in distribution to be reasonable;[78] but the fact that the corpus could have easily been divided was a definite factor in holding delay in another case unreasonable.[79] Since division of corpus is so directly related to the ultimate distribution, any bona fide problems in division should be sufficient excuse for a delay. However, one requirement would seem to be that a division was necessary.

7. Local Law

There are a few references in the trust termination decisions to the applicability of local law to the question of when a trust terminates for tax purposes.[80] None of these cases involved a determina-

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[74] Commissioner v. First Trust & Deposit Co., 118 F.2d 449, 452 (2d Cir. 1941).

[75] Edith M. Bryant, 14 T.C. 127 (1950).

[76] Swoboda v. United Sttaes, 156 F. Supp. 17 (E.D. Pa. 1957), *aff'd* 258 F.2d 848 (3rd Cir. 1958); Gamble v. United States, 116 F. Supp. 694 (E.D. Mo. 1953); Russel v. Bowers, 27 F. Supp. 13 (S.D.N.Y. 1939).

[77] Gamble v. United States, 116 F. Supp. 694 (E.D. Mo. 1953).

[78] Della M. Coachman, 16 T.C. 1432 (1951).

[79] Leonard Marx, 47 B.T.A. 204 (1942).

[80] Swoboda v. United States, 156 F. Supp. 17 (E.D. Pa. 1957), *aff'd* 258 F.2d 848 (3d Cir. 1958); Della M. Coachman, 16 T.C. 1432 (1951); George S. Fiske, 45 B.T.A. 135 (1941); Russel v. Bowers, 27 F. Supp. 13 (S.D.N.Y. 1939); Rev. Rul. 55-287, 1955-1 CUM. BULL. 130.

tion that there was an unreasonable delay for tax purposes when local law permitted the delay. Thus, state trust law and federal tax law have not yet come into direct conflict in the area of trust termination.

8. Individual Circumstances

The fact that there is no defined period after which a delay in distribution is presumed to be unreasonable, and the decision that reasonableness is a question of fact[81] result in each case being considered on its own merits, depending upon the particular circumstances surrounding the case. All the factors outlined above influence the decision as to reasonableness of delay, but none of the factors control absolutely by themselves. Furthermore, this list of factors is by no means complete. There simply have not been enough decisions to date. It is clear, however, that the question of reasonable delay is influenced by factors from both aspects of trust administration. Some pertinent factors stem from the aspects concerned with distributing the corpus to the remaindermen. Examples are sales, dividing corpus, and ascertaining the amount of distribution. Other factors stem from the aspect of administration concerned with obtaining a discharge for the trustee. Examples are accounting and taxes which may involve a personal liability on the part of the fiduciary.

9. Estate Termination Law

There is a certain temptation to apply estate termination law, across the board, to trust termination questions. Estates and trusts are treated together in the same subchapter of the *Code*.[82] They both involve the termination of a taxable entity whose affairs must be wound up. These similarities would tend to make estate termination law applicable to trusts. There are also, however, some very striking differences between estates and trusts which should result in some estate termination decisions not being applicable to trusts. One major difference is that all people die, but few do so voluntarily. While only very few people create trusts, those created are nearly all premeditated, intentional, and voluntary. Also, hardly anyone ever dies purely for tax reasons, while many trusts are motivated, at least in part, by tax considerations. Too, the task of administering an estate is frequently imposed upon the fiduciary with little or no prior warning. The trustee, on the other hand, usually has much more opportunity for preplanning the winding up. These differences should be kept in mind when drawing parallels between estate and trust termination.

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[81] Leonard Marx, 47 B.T.A. 204 (1942).

[82] INT. REV. CODE of 1954, Subchapter J, § 641.

It is not intended here to analyze estate termination case law in detail. The subject has been quite adequately treated by various authors.[83]

CONCLUSION

The *Internal Revenue Code* of 1954 does not define the time at which a trust terminates for tax purposes.

The Committee Reports on H.R. 8300, the Treasury Regulations, and the case law lead to the conclusion that a trust terminates at the earlier of the following two events:

(1) The time when the trust assets have actually been distributed.

(2) The expiration of a reasonable period for distribution.

Whether a delay in distribution is reasonable is a question of fact, and depends upon the circumstances of each individual case. No single factor controls the question of reasonableness and all aspects of trust administration are relevant — aspects related to distributing corpus, as well as aspects related to protecting the trustee from further liability.

The Treasury Regulations further provide that a trust will be considered terminated for tax purposes even though some assets have not been distributed, provided that the assets retained by the trustee are only a reasonable amount set aside in good faith for payment of unascertained or contingent liabilities and expenses, not counting claims by beneficiaries in the capacity of beneficiary.

[83] *Supra* notes 6 and 15. *See also* Bailey, *To Continue or Not to Continue as an Estate,* N.Y.U. 23d ANN. INST. ON FED TAX. 1143 (1965) for a categorization of the factors which influence the question of whether a delay in estate termination is reasonable.

TECHNOLOGY, OCEAN MANAGEMENT, AND THE LAW OF THE SEA: SOME CURRENT HISTORY

BY EDWARD MILES*

In this article Mr. Miles discusses aspects of the recent history of ocean law which reveal the impact of technological development on the processes of developing international standards to govern use and management of the oceans. More specifically he demonstrates how technology considerations have influenced the types of jurisdictional claims over coastal waters which have been made by various countries. The present state of ocean technology is briefly outlined and discussed in terms of its implications for the future development of ocean law, and the author notes that the law of outer space will be shaped in a similar way by considerations of technological development.

INTRODUCTION

THIS paper is intended primarily for the nonspecialist on the law of the sea, and it will discuss some of the salient problems in this branch of international law which have been considered since the time of the League of Nations Codification Conference of 1930.

The major problems discussed concern the resolution of conflicting claims of national jurisdiction over the ocean spaces which are contiguous to particular nation-states. The considerations which motivate a particular nation to claim a 3 or a 6 or a 12-mile territorial sea, and the considerations which are relevant to the regulation of ocean uses beyond the boundaries set by the traditional concepts of "territorial sea" have changed drastically in recent years. The most significant of these changes have been recent innovations in marine technology. The problems which have been generated by these changes have come to the forefront of international attention. It is the purpose of this paper to provide both a summary of these current problems in the law of the sea and a guide to the more specialized literature in which these problems are discussed in more detail.

In their monumental work on the law of the sea,[1] Professors McDougal and Burke have pointed out that this phenomenon of international ocean management really reflects three basic processes vis-a-vis the human use of the oceans. At the highest level of general-

* Assistant Professor, Graduate School of International Studies, University of Denver; B.A., M.A., Ph.D.

[1] M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS (1962).

ity these are: (a) The process of interaction on and in the oceans among all participants; (b) The process of claim arising out of these activities; and (c) The process of authoritative decision to resolve contending claims.[2]

These processes will be examined, paying particular attention to the relationship between them. More specifically it will be seen that the actual and possible uses of the oceans, as viewed from the perspective of each country's economic and political situation, have determinative effects on the processes of claim and authoritative decision.

I. The Impact of Technological Development

The extent to which a country is able to use the ocean as a resource is dependent upon the state of that country's technological and economic development. Interaction on or in the oceans among nation-states would indeed be impossible without some minimum degree of development in marine technology. It is therefore not unexpected that rapid advances in marine technology would have a substantial effect upon the entire process of developing international standards to govern the use of the oceans.

During the last six years, and particularly within the last five, there has been considerable ferment on national, regional, and global levels of questions concerning the exploration and exploitation of the oceans. This ferment is a function of several factors, the major one of which appears to have been the continuing advance in marine technology, which has had a major impact on the national security of nation-states, as well as on the economic potential of ocean exploitation.[3]

Marine technology as it has existed up to the present time has facilitated five kinds of human uses of the ocean. These are for (a) transportation and communication, (b) food resources, (c) mineral resources, (d) national security, and (e) recreation. They have involved essentially two-dimensional uses of the ocean, but advances in technology have now placed us on the threshold of the third dimension — depth. The inefficiency and dangers of operating at or near the air-sea interface are being significantly reduced, if not eliminated, and for the first time the exploitation of the deep ocean

[2] *Id.* ch. 1.

[3] See the comprehensive estimates published in Committee on Oceanography of the National Academy of Sciences/National Research Council, [hereinafter cited as NAS/NRC] Economic Benefits from Oceanographic Research (Pub. No. 1228, 1964).

floor is a distinct possibility. In addition to this, we have begun to pay increasing attention to the interaction between the atmosphere and the oceans with a view toward expanding our knowledge of weather and climate and the possibilities of exercising some control upon them.[4]

This increasing technological sophistication has changed the order of importance of possible conflict confronting participants within the international maritime system. Through 1960, the major problem was the limit of the territorial sea as it related to the problem of jurisdiction over coastal fisheries. In 1969, the major problem concerns the limits of the continental shelf and jurisdiction over the ocean floor beyond the shelf.

During the early international conferences concerning national dominion over adjacent seas, nations with limited technological resources demanded large limits subject to their sovereign control in order to prevent their coastal fisheries from being exploited by distant nations with technologically superior fishing fleets. The technologically advanced nations, on the other hand, wanted to protect distant international waters, which they were capable of exploiting, from encroachments by the coastal state.

Throughout the many conferences on the subject of national dominion over adjacent seas during the early years, progress was made toward establishing uniform international norms, but no satisfactory agreement was ever adopted. However, the recent developments in technology have opened up new areas for national exploitation including the sea bottom adjacent to the coast and the ocean depths beyond. This new capacity to reach the ocean bottom has shifted the debate from the monopoly of coastal fishing to entirely new problems unknown before this decade. As the capacity to reach these new depths increases, the jurisdictional interests of adjacent nations increase as well, and once again the conflict between these expanding interests has brought the issue of ocean management in its broadest implications to the forefront of international concern. These issues became the focus of the United Nations General Assembly debates on the Resources of the Sea in the fall of 1966,[5] and the Maltese *note verbale* of August 18, 1967, proposing inter-

[4] *See* NAS/NRC, INTERACTION BETWEEN THE ATMOSPHERE AND THE OCEANS (Pub. No. 983, 1962); HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, SPACE AND THE WEATHER, H.R. REP. NO. 2561, 87th Cong. 2nd Sess. (1962); W. Sewell, Human Dimensions of the Atmosphere, Feb. 1968 (Draft Report to the National Science Foundation, Program on Applications Analysis, National Center for Atmospheric Research, Boulder, Colorado).

[5] U.N. Doc. A/OR/21/C.2/SR (1966), at 1062-65.

national control of the ocean floor "beyond present limits of national jurisdiction."[6]

The problems generated by the expansion of these national jurisdictional interests may be pointed out by comparing one of the earlier conferences on the law of the sea with some of the more recent conferences.

II. Salient Problems in the Law of the Sea Since 1930

At this time a review of three attempted codifications of the law of the sea — The Hague Codification Conference of 1930, sponsored by the League of Nations, and the United Nations Geneva Conferences of 1958 and 1960 — will reveal quite clearly the processes of claim and authoritative decision, and will show how these processes have been affected by expanding jurisdictional interests. We should remember, however, that the three attempts at codification took place in two different international organizations and inevitably reflect the larger structures of these systems. For instance, while it is true that norms which systematize and regulate activities of competing participants on the oceans have historically reflected the prevailing interests and capabilities of the major nation-states, particularly under the League of Nations, since 1955 minor members of the international system, concomitant with their increased role in the United Nations General Assembly, have been effective in challenging existing norms and influencing the emerging law of the sea in such a way as to be responsive to their own interests.[7]

[6] U.N. Doc. A/6695 (Aug. 18, 1967). For summaries of recent developments in marine technology and the challenges they pose, see *e.g.*, W. Burke, Ocean Sciences, Technology, and the Future International Law of the Sea (1966); National Council on Marine Resources and Engineering Development, Marine Science Affairs — A Year of Transition (1967); President's Science Advisory Committee, Panel on Oceanography, Effective Use of the Sea (1966); W. Chapman, The State of Ocean Use Management, Apr. 24, 1967 (unpublished paper presented to the 2d Session of the FAO Committe on Fisheries, Rome).

[7] For reports and analyses of the Geneva Conferences, See Burke, *Some Comments on the 1958 Conventions*, American Society of International Law [hereinafter cited as ASIL] Proceedings, 1959, 197-206; Dean, *The Law of the Sea Conference, 1958-1960, and Its Aftermath*, in The Law of the Sea, 244-64 (L. Alexander ed.) [hereinafter cited as Alexander (1967)]; Dean, *Achievements at the Law of the Sea Conference*, ASIL Proceedings, 1959, at 186-97; Friedheim, *Factor Analysis as a Tool in Studying the Law of the Sea*, in Alexander (1967), at 47-70; Herrington, *The Convention on Fisheries and Conservation of Living Resources, Accomplishments of the 1958 Geneva Conference*, in Alexander (1967), at 26-35; McDougal & Burke, *supra* note 1; Neblett, *The 1958 Conference on the Law of the Sea: What Was Accomplished*, in Alexander (1967), at 36-46; Dean, *The Second Geneva Conference on the Law of the Sea*, 54 Am. J. Int'l Law 751-89 (1960); Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 Am. J. Int'l Law 607-28 (1958); Friedheim, *The "Satisfied" and "Dissatisfied" States Negotiate International Law*, 18 World Pol. 20-41 (1965); Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 Am. J. Int'l Law 629-59 (1958).

In the three international conferences under consideration, the issues of determining the limit of the territorial sea and the extent of fishing rights in the contiguous zone became the focal points around which highly disruptive conflict revolved, and in none of them was it possible to arrive at agreement. In at least two of these three conferences, these two issues were regarded as the crux of the whole undertaking of the codification of the law of the sea.[8] This is a vivid example of a situation in which no solution appeared to be a better alternative than a solution which ignored the claims of any of the competing groups, most of whom rigidly adhered to their initial positions.

Claims made with regard to desired limits of the territorial sea were almost identical under both the League and United Nations conferences. Although some participants shifted their positions over time, the limits suggested under the League were the same as those proposed under the United Nations, with the exception of claims to prescribe and apply authority over an area extending 200 miles from the coastline made by certain Latin American states after 1945. Also, under the League, the debates tended to be conducted in much more doctrinal terms than under the United Nations, with the result that the interests which lay behind these claims were often obscured.

A. *The Hague Conference of 1930*

At The Hague Conference of 1930, both the United Kingdom and the United States, *inter alia,* firmly adhered to a 3-mile limit as being most efficacious in preserving the historic freedom of the seas.[9] This was, in fact, the majority position to which other nations submitted alternatives.

The most extreme claim which confronted adherents of the 3-mile limit was Spain's initial proposal that each country be allowed unilaterally to fix the breadth of its own territorial sea.[10]

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[8] Statement of the representative of Saudi Arabia at the 2nd Conference sponsored by the U.N.: U.N., SECOND UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, Official Records, Summary Records of Meetings of the Committee of the Whole, March 17-April 26, 1960, A/CONF.19/8, at 37 [Hereinafter cited as U.N. 2ND SEA CONFERENCE]. *See also,* the statement of the Chairman of the 2nd Committee on Territorial Waters at The Hague Codification Conference of 1930, LEAGUE, PUBLICATIONS: LEGAL, V, 1930, 2nd Committee, Doc. C.351(b).M.145(b). V, at 119 (1930).

[9] U.N. 2ND SEA CONFERENCE, *supra* note 8, at 17-18, 20.

[10] *Id.* at 28.

TABLE 1

State Policies Towards the Breadth of the Territorial Sea Before The Hague Codification Conference of 1930[11]

3-mile limit	4-mile limit	6-mile limit	12-mile limit	18-mile limit	Unilateral delimitation
Australia	Norway	Finland	—	Portugal	Spain
Denmark	Sweden	Italy			
Egypt					
Estonia					
France					
Germany					
India					
Japan					
Latvia					
Netherlands					
New Zealand					
Poland					
Romania					
Union of South Africa					
United Kingdom					
United States					
(Total – 16)	(Total – 2)	(Total – 2)	(Total – 0)	(Total – 1)	(Total – 1)

In descending order of exclusiveness, Portugal claimed a 12-mile limit, and in the explanation of her position we have a condensed version of the entire conflict over the delimitation of the territorial sea in both the League of Nations and the United Nations. Since Portuguese fishing sites extended in the relatively shallow water around her coasts for approximately 12 miles, said the Portuguese delegate, and since the Portuguese population was considerably dependent upon the fishing yield for a substantial part of its diet, Portugal could not agree to any limit which would deprive her of satisfying this essential interest.[12] If, however, most states were opposed to a 12-mile limit, Portugal was prepared to agree to a 6-mile limit and a contiguous zone of a further 6 miles in which her comprehensive and continuing exclusive jurisdiction and control over fishing rights would be acknowledged.[13]

The primary interest with which all states were concerned involved the competence to extend or prescribe authority over *fishing* in certain waters adjacent to their coasts and beyond. Thus, by as early as 1930, the terms of a debate which was to occur many times were firmly established. The confrontation was one between those states like Great Britain, the United States, and Japan which had the capability and need for engaging in distant-water fishing and those states possessing the need but not the capability for doing so. In the latters' eyes, therefore, it was essential to gain exclusive control over as wide an area of the sea adjacent to their coasts as was

[11] Complied from, LEAGUE, PUBLICATIONS: LEGAL, V, BASES OF DISCUSSIONS: TERRITORIAL WATERS, Doc. C.74, M.39, at 22-32 (1929).

[12] *Id.* at 18.

[13] *Id.*

possible; their attempts to do so were encroachments upon the distant-water fishing interests of the larger nation-states.

After days of arguing, the original positions of states were virtually unchanged and no agreement was in sight.[14] The Hague Conference was unable to agree upon an International Convention regulating the limits of the territorial sea. As one Committee Chairman put it: "There is an atmosphere of resignation in the Committee. We have to acknowledge to our regret that agreement is not possible on the question of the breadth of territorial waters."[15]

TABLE 2

State Policies Towards the Breadth of the Territorial Sea at the End of the Conference[16]

3-mile limit	4-mile limit	6-mile limit	12-mile limit	18-mile limit	Unilateral delimitation
Australia	Finland	Chile	Portugal	–	–
Belgium	Iceland	Colombia			
Brazil	Norway	Cuba			
Canada	Sweden	Italy			
China		Persia			
Denmark		Romania			
Egypt		Spain			
Estonia		Turkey			
France		Uruguay			
Germany		Yugoslavia			
Greece					
India					
Irish Free State					
Japan					
Netherlands					
Poland					
Union of South Africa					
United Kingdom					
United States					
(Total – 19)	(Total – 4)	(Total – 10)	(Total – 1)	(Total – 0)	(Total – 0)

B. *First United Nations Conference of 1958*

As indicated, there was very little difference in substance between confrontations over delimitation of the territorial sea under the League and confrontations under the United Nations. The international conferences sponsored by the United Nations did, however, manage to reveal exactly those interests that lay behind various positions. That these were much the same as those existing in 1930 was testified to by the delegate from Jordan in the First Committee of the United Nations Conference on the Law of the Sea.[17]

[14] *Id.* at 123-26.

[15] *Id.* at 160.

[16] Compiled from, LEAGUE, PUBLICATIONS: LEGAL, V, 2nd Committee, Territorial Waters, Doc. C. 351(c).M.145(c) (1930).

[17] U.N. CONFERENCE ON THE LAW OF THE SEA, Geneva, Feb. 24-Apr. 27, 1958. Summary Records of the Meetings of the First Committee (The Territorial Sea and the Contiguous Zone), A/CONF. 13/39, at 18 (1958) [hereinafter cited as U.N. SEA CONFERENCE].

Summing up the conflict taking place in the First Committee over the issue of the breadth of the territorial sea, it appeared to the Jordanian delegate that the problem occurred as a result of divergent views adopted by the great maritime powers, on the one hand, who called for a decision on the basis of 3 miles, and the smaller nations, on the other hand, who urged that a limit of 12 miles or more be established. The bases of these divergent views, he thought, were to be attributed to the fact that a strict interpretation of the freedom of the seas would work to the advantage of the larger maritime states while an extension of the area in which smaller states could exercise comprehensive and continuing exclusive jurisdiction and control would serve their interests — which were partially dictated by their concern with defense.[18] The concern with defense may have been of paramount importance for the State of Jordan, given the prolonged condition of hostility existing between the Arab States of the Middle East and Israel. For the rest of those states opposing the establishment of a 3-mile limit, however, the uppermost concern remained with fishing rights.

The United Kingdom, supported by the Netherlands, Canada, and France, continued to adhere to a 3-mile limit as the one which had gained the widest historical acceptance and practical application.[19] Being a little more specific, the United States claimed that a 3-mile limit was the safest for shipping and was the most equitable limit possible for all states.[20] Furthermore, a 3-mile limit, if generally recognized, would serve to secure fisheries, a source of food for all the world, from further encroachment of the coastal state.[21] This claim was strongly supported by Japan, which depended on the sea for 90 percent of her animal protein.[22]

Of those states who lobbied for a 3-mile limit, Canada was among the first to offer a compromise — the establishment of a 3-mile territorial limit, with a 12-mile contiguous zone for fishing.[23] Now forced into specificity, the United Kingdom replied that its own economic interests could not admit to such an extension.[24]

The most extreme claims were those proposed by Peru, Chile, Costa Rica, and El Salvador, all of whom demanded general recog-

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[18] *Id.*

[19] *Id.* at 8, 11, 19.

[20] *Id.* at 25-26.

[21] *Id.*

[22] *Id.* at 24-25.

[23] *Id.* at 90. The phrase "territorial limits" meant those waters subject to a comprehensive and continuing exclusive jurisdiction and control — *i.e.*, subject to the absolute sovereignty of the adjacent nation. The phrase "contiguous zone" meant those waters beyond the territorial limits over which the adjacent nation would be awarded specified competences by international agreement to occasionally exercise jurisdiction and control with regard to certain particular interests within the zone.

[24] *Id.* at 104.

nition of the extension of their territorial sea to *200* miles in order "to protect the living resources of the sea from excessive exploitation by foreign fishing fleets."[25] Both Burma and Indonesia called for the establishment of varying breadths based on the "economic, geographical, biological, technological, political, and defense needs of the state concerned."[26] The foregoing positions, and others, are summarized in Table 3.

In the light of these diverse positions, each supported so rigidly by its own faction, it is not surprising that effective compromise proved elusive. In addition, voting tended to be in blocs composed on the basis of interests and/or geographical location, and all proposals which were offered failed to command a consensus, no matter how many conciliations were made.

C. *Second United Nations Conference of 1960*

The Second United Nations Conference on the Law of the Sea in 1960 was essentially a continuation of the first, and the attending nations continued to build upon proposals submitted during the previous conference in an attempt to reach the two-thirds majority required for agreement. In another attempt at the reconciliation of competing interests, the United States reintroduced a proposal in which the maximum limit of the territorial sea was to be 6 miles with a contiguous zone for fishing extending for another 6 miles.[28] In addition, foreign fishermen who had been accustomed to fish in this contiguous 6-mile zone before January 1, 1958 (the base period), would be allowed to fish for the same yield of the same groups of species.[29] The United States delegate also explicity recognized that this proposal did not provide for those special situations in which the coastal state was particularly dependent upon fishing but where it did not possess the technical capability to fish beyond coastal waters. On this point, however, the United States was prepared to extend sympathetic and careful consideration.[30]

The United Kingdom, with great reluctance, supported this proposal which would involve a "heavy sacrifice" for her fishing interests.[31] But the Yugoslav delegate severely attacked the provision securing the rights of foreign fishermen as a poorly conceived effort to uphold acquired rights which were nothing but "vestiges

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[25] *Id.* at 33; *see also* 6, 48.

[26] U.N. SEA CONFERENCE, *supra* note 17, at 4, 14.

[27] U.N. 2ND SEA CONFERENCE, *supra* note 8, at 158-63.

[28] U.N. 2ND SEA CONFERENCE, *supra* note 8, at 45-46.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 55.

TABLE 3

State Policies Towards the Breadth of the Territorial Sea, 1960[27]

3-mile limit	4-mile limit	5-mile limit	6-mile limit	9-mile limit	10-mile limit	12-mile limit	200-mile limit
Argentina	Finland	Cambodia	Ceylon	Mexico	Albania	Bulgaria	Chile
Australia	Norway		Colombia			Ecuador	Costa Rica
Belgium	Sweden		Greece			Ethiopia	El Salvador
Brazil			India			Guatemala	Peru
Canada			Israel			Indonesia	
China (Rep. of)			Italy			Iran	
Cuba			Spain			Libya	
Denmark			Thailand			Panama	
Dominican Rep.			Uruguay			Romania	
Fed. of Malaya			Yugoslavia			Saudi Arabia	
France						UAR	
Ireland						USSR	
Japan						Venezuela	
Jordan							
Liberia							
Netherlands							
Pakistan							
Poland							
Tunisia							
Union of South Africa							
United Kingdom							
United States							
(Total – 22)	(Total – 3)	(Total – 1)	(Total – 10)	(Total – 1)	(Total – 1)	(Total – 13)	(Total – 4)

of colonialism."[32] Canada was again opposed to this provision but this time was prepared to compromise if the United States placed a 5-year limit on the preceding base period and a 10-year limit on the exercise of these benefits by foreign fishermen from October 31, 1960. This having been done, the proposal was jointly sponsored by the United States and Canada.[33] Because of this amendment, though, the proposal was unpalatable to the United Kingdom, to whom the time periods were too short and the costs too great.[34] But she still voted for it in Plenary Session, at which time the vote was 54 in favor, 28 opposed, with five abstentions.[35] It was not adopted, however, as it was one vote short of the required two-thirds majority. Consequently, no norm regulating the breadth of the territorial sea was included in the results of either convention.

Only a few of the significant positions, proposals, and votes on this issue are described above. However, Robert Friedheim has factor analyzed all 78 votes — 67 substantive and 11 procedural — taken during the 1958 and 1960 Geneva Conferences in order to determine the underlying issues of conflict in voting behavior.[36] His results are compatible with the statements made heretofore.[37]

III. OVERVIEW OF OUR CURRENT SITUATION

Given this background, what trends are now evident on issues concerning the territorial sea, contiguous zone, and jurisdiction over fisheries?

At the end of the long discussions on the problem of the territorial sea in the International Law Commission, there was neither

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[32] *Id.* at 70.

[33] *Id.* at 121.

[34] *Id.* at 126-27.

[35] *Id.* at 30.

[36] Friedheim, *Factor Analysis as a Tool in Studying the Law of the Sea,* in ALEXANDER (1967), at 47-70.

[37] *Id.* at 57. Friedheim claims that combining proposals on the breadth of the territorial sea with proposals on a contiguous zone probably explained the failure to reach any acceptable compromise. As mentioned earlier, *supra* note 23, the contiguous zone was an area beyond the territorial limits over which the adjacent nation would be awarded specified competences to exercise a limited jurisdiction with regard to particular interests. Conflict regarding the contiguous zone revolved around what specified competences were to be awarded the coastal state, the legal significance of such competence, and the manner in which its enforcement was to be accomplished. *See e.g.,* LEAGUE, PUBLICATIONS: LEGAL, V, 2d Committee, at 31, (1930).

For example, although it was generally agreed that a state could exercise occasional jurisdiction in the contiguous zone in regard to fiscal, sanitary, and customs interests (A/CN.4/Ser. A/1956/Add. 1, 2 ILC YEARBOOK, 1956, at 264 (1956)) a dispute arose at the first United Nations Conference as to whether or not a coastal state should be allowed to exercise jurisdiction and control within the contiguous zone on the basis of security interests. U.N. SEA CONFERENCE, 1st Committee, at 107, 181. *See also,* criticisms of the International Law Commission's recommendations and the decisions of the 2nd U.N. Conference in MCDOUGAL & BURKE, *supra* note 1, at 76, 604-07.

a single point of view nor a concrete proposal which had gained general acceptance. In the face of hopeless deadlock, therefore, by the significant vote of 7 to 6, the ILC passed the problem on to the future international conference in the following way:

1. The Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles.
2. The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles.
3. The Commission, without taking any decisions as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles.[38]

Somewhat ironically, in spite of (or perhaps as a result of), the conflict generated in 1958 and 1960, this is about where we stand. Even at the end of the 1930 Conference the traditional 3-mile limit still represented the majority position, although the 6-mile limit had increased its supporters from two to 10. By 1960, however, the 3-mile position had declined from a majority to a plurality, the 10-mile position had remained steady but was superseded by the 12-mile position which now had 13 adherents. In fact, a majority of states (33) supported positions which called for limits greater than 3 miles. If they did nothing else, therefore, the 1958 and 1960 Conferences definitely undermined the supremacy of the traditional restrictive 3-mile limit and the lesser developed states did much to achieve this.

As of 1967, the situation, based on data provided by Professor Lewis Alexander, looks like this:

TABLE 4

Frequency Distribution of Current Limits to the Territorial Sea[39]

Limit	Number of Countries	Limit	Number of Countries
3 miles	32	12 miles	26
4 "	3	50 Km.	1
5 "	1	130 miles	1
6 "	16	200 "	1
12 Km.	1	None specified	7
9 miles	1	No information	15
10 "	2	Landlocked countries	28

Although the distribution is considerably affected by the comprehensiveness of the data, the major clusters are still around the 3, 6, and 12-mile limits. However, at least 50 percent of all countries with a seacoast now have limits beyond 3 miles. The figure is higher than that if we realize that states like Costa Rica, Iceland, Peru,

[38] A/CN.4/Ser. A/1955 Add 1, 2 ILC YEARBOOK, 1955, at 35.

[39] Alexander, *Offshore Claims of the World,* ALEXANDER (1967), Table 3, at 72-75.

and South Korea who report no specified limit certainly are not stout defenders of the traditional norm. On the other hand, there are only three countries who claim limits beyond 12 miles, and so we are back to the ILC's conclusion.

While the evidence suggests that exclusive claims on the territorial sea may have stabilized around the 12-mile limit as maximum, it is not entirely clear that claims concerning fishery jurisdiction have also stabilized, even though zones up to 12 miles now represent the majority (55 out of 86) position.[40]

There is another irony about all this — fish do not breed and live according to rigidly defined constructs like contiguous zones, nor is a territorial sea of 12 miles any more effective for security reasons than one of 3 miles.[41] As McDougal and Burke so aptly point out, the spatial variable per se is not crucial and, indeed, is often misleading. Rather, "what is important for policy is not mere distance but the concentration of activities and interests being located."[42]

If we were to contrast the distinctive features of the 1958 and 1960 Geneva Conferences with those of The Hague Conference of 1930, the major differences would have to be phrased in terms of the primacy of the East-West confrontation in the post World War II era, the rate of technological advance and the expectations that are generated as a result, and the role played by the smaller, lesser developed participants in shaping the outcomes of the last two conferences. One of the other striking differences to be observed would be in the whole issue of the continental shelf which did not even exist as far as The Hague Conference was concerned.

It was not until 1942 that the first treaty demarcating relative jurisdictions over the shelf in the Gulf of Paria was signed between Britain and Venezuela, and it was not until 1945 that the United States issued its proclamation claiming jurisdiction over the shelf surrounding the United States.[43] This was followed by an Argentinean claim which included the superjacent waters, with the United States denying the validity of the latter ingredient.

The problem of defining the limits of the shelf is difficult because the concept refers to the subsoil extending from the coast of a state out under the sea and the geologic diversity which exists makes any limit defined in terms of depth an artificial one. This is

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[40] Neblett, *The 1968 Conference on the Law of the Sea: What Was Accomplished,* ALEXANDER (1967), Table 1, at 42.

[41] McDougal, *International Law and the Law of the Sea,* ALEXANDER (1967), at 20.

[42] MCDOUGAL & BURKE, *supra* note 1, at 9, n. 25.

[43] For the relevant documents, see H. BRIGGS, THE LAW OF NATIONS 377-85 (2d ed. 1952). For a more conprehensive history see Moutan, *The Continental Shelf,* 85 RECUEIL DES COURS 347-463 (1954).

so even though UNESCO claimed in 1957 that the continental shelf had a remarkably uniform marginal depth of 100 to 150 meters.[44]

Prior to 1945, the shelf was important primarily for coastal fisheries, both pelagic and sedentary, because the water is sufficiently shallow to allow considerable photosynthetic activity which leads to the creation of rather large fisheries.[45] In addition, there was some coal mining, but it was the coming of off-shore oil drilling operations that led to the new significance attached to this area. As a result, the continental shelf became a major issue about which most controversy turned in the ILC's preparatory work on the law of the sea.

As the Commission stated in its commentary, the debate over definitions of the continental shelf was a long (and at times confusing) one.[46] Several times the Commission wavered between adopting the criterion of exploitability to define the limits of the shelf and adopting a precise limit based on the depth of the superjacent ocean, *i.e.*, up to 200 meters. In the end, the Commission included both criteria.[47]

During the discussion on the legal status of the shelf, Mr. Ivan Kerno, representative of the Secretary-General to the ILC, stated that whatever the Commission decided about the continental shelf, explicit mention should be made of the status of its superjacent waters.[48]

He suggested that although it was necessary for the ILC to make specific the depth and distance up to which rights of jurisdiction and control could be exercised by the coastal state, these limits should be supplemented by a provision designed to maintain the flexibility of the norm vis-a-vis continued advances in techniques of exploitation. In other words, both a fixed limit *and* the exploitability criterion should be employed. There appeared, at no time,

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[44] UNESCO, SCIENTIFIC CONSIDERATIONS RELATING TO THE CONTINENTAL SHELF, in U.N. SEA CONFERENCE: PREPARATORY DOCUMENTS, Doc. A/CONF. 13/2/Add. 1, at 39-46 (1957). For a more recent analysis which differs considerably from UNESCO's, see Emery, *Geological Aspects of Sea-Floor Sovereignty,* in ALEXANDER (1967), at 139-59.

[45] Chapman, *Fishery Resources in Offshore Waters,* in ALEXANDER (1967), at 87-105. *See also* FAO, *Examination of Living Resources Associated with the Sea Bed of the Continental Shelf with Regard to the Nature and Degree of their Physical and Biological Association with Such Sea Bed* in U.N. SEA CONFERENCE: PREPARATORY DOCUMENTS, Doc. A/CONF. 13/13, at 187-97 (1957).

[46] 2 ILC YEARBOOKS, 1956, at 296-97.

[47] Article 67 reads:

> For the purposes of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms) or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

A/CN.4/Ser. A/1956/Add. 1, at 296.

[48] U.N. Doc's A/CN.4/Ser. A/1950, 1 ILC YEARBOOK, 1950, at 228.

to have been any consideration of the probable incompatibility of these two criteria in practice, especially in terms of the conflict which might be generated between those states which could sponsor and employ advances in techniques of exploitation as opposed to those which could not. Prior to the 1958 Conference, UNESCO had prepared a working paper on this question which specifically pointed out the incompatibility of a combined bathymetric/exploitability limit, but there is no indication that this warning was heeded in the debates.

The solution which was finally adopted during the actual conference was that a clause be inserted in the article defining the shelf, and stipulating that no state could exploit the seabed and subsoil off the coast of another without its express consent.[49] With this sole addition, the conference accepted the recommendation of the Commission, which was a compromise on the lowest common denominator — words rather than substantive issues.

The problem which now confronts us is that it has become technologically possible to drill for oil and other minerals far beyond the 200-meter isobath, leaving the limit on the shelf rather open-ended. In addition, mineral exploitation has significant impacts on other uses of the ocean — fishing, navigation, and security — and these conflicting uses must be reconciled. I will return to current attempts to deal with expanding national jurisdiction over the oceans after I survey some of the more important technological innovations in ocean exploitation.

IV. RECENT INNOVATIONS IN MARINE TECHNOLOGY AND THEIR IMPACTS ON THE INTERNATIONAL USE OF THE OCEANS

In this section a number of innovations will be cataloged, current and predicted, which were pinpointed at the first Mershon Conference on Law, Organization, and Security in the Use of the Oceans.[50] These innovations will be put into the following categories: fishing, drilling and mining, military uses, and weather prediction and control.[51] Although these have to be separated for purposes of analysis, I do not wish to leave the reader with the misleading

[49] U.N. SEA CONFERENCE, 4th Committee, A/CONF. 13/42, at 43 (1957).

[50] Held at Columbus, Ohio, Ohio State University, March 17-18, 1967.

[51] For other summaries, see, Abel & Sullivan, *Trends in Marine Sciences,* in ALEXANDER (1967), at 42; W. BURKE, OCEAN SCIENCES, TECHNOLOGY, AND THE FUTURE INTERNATIONAL LAW OF THE SEA (1966); Burke, *Law and the New Technologies,* in ALEXANDER (1967), at 204; MacDonald, *What's in the Ocean,* 64 INT'L SCI. & TECH. 38 (1967); J. Craven, Technology and the Law of the Sea, Mar. 17, 1967 (unpublished paper presented to the first Mershon Conference on Law, Organization, and Security in the Use of the Oceans, Mar. 17-18, 1967, at Ohio State University, Columbus, Ohio) [hereinafter cited as 1st Mershon Conference]; J. Knauss, Problems in Oceanography — 1977, Mar. 17, 1967 (unpublished paper presented to the first Mershon Conference).

impression that each category can actually be dealt with in isolation. The ocean is a single system in which all technologies have multiple impacts, compatible and incompatible, on other uses and users. Two generalizations can be made which should be kept in mind at all times but which are rarely underscored in the popular literature. These are:

(a) That technological advance per se is inherently unlimited; but

(b) That the widespread utilization of new technologies will be determined, in broad terms, by the rate of return for industry and by cost/benefit ratios for governments.

A. *Innovations in Fishing*[52]

One built-in uncertainty about this problem is that we do not know what major technological breakthroughs are likely, but Kasahara suggests that research ought to be channeled primarily into two major fields. These are: "the utilization of marine animals (including zooplankton) at lower trophic levels; and the possibility of changing oceanographic conditions to increase primary productivity."[53] Similarly, it is fair to say that, apart from normal improvements in gear, boats, the composition and capability of fleets, etc., most recent innovations reflect to varying degrees the concern with moving from fishing as hunting to more efficient and controlled systems of husbandry.[54]

More specifically, these innovations have been directed toward such activities as farming both crustacea and pelagic species in bays, estuaries, and other enclosed places, herding fish in the open sea by using electric fields or trained porpoises, harvesting krill in the antarctic, manipulating the ecosystem of certain portions of the ocean to increase productivity by inducing artificial upwelling, and developing marine protein concentrate for human consumption.[55] Until these become effective methods of "aquaculture," Gemini photographs have shown that it is possible to use orbiting satellites

[52] This section is based primarily on the following unpublished works from the 1st Mershon Conference: W. Chapman, Food Production from the Sea and the Nutritional Requirements of the World; H. Kasahara, Food Production from the Ocean; D. Moore, Developing Fishing Technology and the Future Law of the Sea; M. Schaefer, Some Comments on Interaction between the Exploitation of the Food Resources and Other Uses of the Ocean.

[53] H. Kasahara, *supra* note 52, at 17.

[54] Proceedings of the 1st Mershon Conference, at A6-A7 (privately distributed publication); *see also,* Isaacs, *Food From the Sea,* 64 INT'L SCI. & TECH. 61 (1967).

[55] *See,* E. Miles, Some Socio-Cultural Problems Involved in Expanding Use of Marine Protein Concentrate for Human Consumption, Oct. 5, 1967 (unpublished paper presented to the Second Mershon Conference on Law, Organization, and Security in the Use of the Oceans, Oct. 5-7, 1967, at Ohio State University, Columbus, Ohio) [hereinafter cited as 2nd Mershon Conference].

to detect large schools of fish and thereby to aid fishermen in their search.[56]

It has been suggested that sedentary fish farming and the harvesting of pelagic species on the continental shelf have been greatly facilitated by another major technological innovation — saturation diving.[57] But so far fish farming on a large scale is an enormously expensive activity and is therefore not likely to be widely employed. The difficulties of farming in the open ocean are still considerable, and it is not at all clear that the harvesting of zooplankton will in the long run generate sufficient pay-off. The most promising of the innovations cataloged here is thought to be inducing artificial upwelling by nuclear energy, and it is estimated that the cost/benefit ratios will become more favorable as the cost of producing nuclear energy decreases.[58]

B. *Innovations in Drilling and Mining*

I will not detail here specific innovations in ocean drilling and mining activities.[59] I need only point out that the thrust of all these innovations is to provide the petroleum and mining industries with a greater mobility and an enlarged capability for operating at greater depths of the ocean in their search for new raw materials and new energy reserves. As one expert put it: "I believe that in the future, semisubmersibles and the self-powered floaters will be committed to ever-increasing water depths. The ultimate design objective for a drilling unit is depicted as a totally automatic, submarine unit, whose principal function will be unaffected by environmental forces."[60]

We should realize, also, that these developments will have several side-effects among which will be an increase in the difficulty of controlling oil and other pollution of the ocean. The emergence of the supertanker has presented us with this problem in a magnitude

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[56] *See,* W. Chapman, Implications of Space Research to Fishery Development, Apr. 7, 1967 (Unpublished paper presented to the Symposium on the Ocean from Space conducted by the American Society for Oceanography in Houston, Texas, Apr. 7, 1967).

[57] *See,* J. Craven, *supra* note 51, at 24-25; Clarke, Flechsig & Grigg, *Ecological Studies During Sealab II,* 157 SCIENCE 1381 (1967).

[58] Comment by Dr. M. B. Schaefer at the 1st Mershon Conference.

[59] *See* Brooks, *Deep Sea Manganese Nodules: From Scientific Phenomenon to World Resources* in THE FUTURE OF THE SEAS RESOURCES 32 (L. Alexander ed. 1968). Hibbard, *Offshore Petroleum and Natural Gas: A Marine Resource of Increasing Importance* in THE FUTURE OF THE SEAS RESOURCES 52 (L. Alexander ed. 1968); Mero, *Alternatives for Minteral Exploitation* in *id.* at 94; Walthier, *Remarks on the Mining of Deep Ocean Mineral Deposits* in *id.* at 98; Andel, *Deep-Sea Drilling for Scientific Purposes: A Decade of Dreams,* 160 SCIENCE 1419 (1968); Coene, Profile of Marine Resources, Mar. 17, 1967 (unpublished paper presented to the 1st Mershon Conference).

[60] Hibbard, *supra* note 59, at 53.

hitherto unexperienced.[61] Oil, as well as radioactive waste, will continue to pollute the oceans, while we are still largely ignorant of the effect of these on the ecosystem of the ocean.

C. *Innovations in Military Technology*

In the area of military technology we will continue to see improvements on Polaris-type systems, accelerating research to enhance a nation's anti-submarine warfare capability, improvements in propulsion, particularly with regard to making the fuel cell an economic alternative to nuclear power, and we are now at the point where the emplacement of missile silos on the ocean floor is technically feasible. But perhaps the most dramatic recent innovation is the deep submersible with its attendant improvements in the structure of hulls and command and control systems. As Dr. John Craven, Director of the United States Navy's Deep Submergence Systems Project, states: "[T]he projection of deep-ocean technology is such that in the period beyond 1980 we may expect a socially-significant proliferation of non-military submersibles and equipment of low-cost, capable of operating throughout the water column at/or on the bottom and capable of exploiting the sea bed or the resources of the sea bed."[62]

It is clear that these deep submersibles will be used for a wide range of military and nonmilitary purposes, from finding lost H-bombs and submarines, to conducting ocean science research, to carrying out exploration and exploitation of mineral and petroleum resources. They will be owned not only by governments but by private companies and individuals, and this will add a host of new complications to the use of the deep ocean and the sea bed. As far as the utility of these vessels for research is concerned, one expert has made the following observation:

> Without question the most valued feature of the submersible is that the observer can visit the site and make direct records of his observations. Examples of the work thus made possible are direct, prolonged observation of the behavior of marine organisms and of the fine variability in sediments; observation of sediment transport and features of deeply submerged canyons; observation of near bottom currents with dye; discovery of extensive terraces on the continental shelf; correlation of the biota with the nature of the bottom sediment; proof of the existence of life at the deepest known spot in the ocean; exploration of the bathymetry and biota

[61] *See* Nanda, *The "Torrey Canyon" Disaster: Some Legal Aspects*, 44 DENVER L. J. 400 (1967); Walsh, *Pollution: The Wake of the "Torrey Canyon,"* 160 SCIENCE 167 (1968).

[62] J. Craven, *supra* note 51; *see also* Craven, *Ocean Technology and Submarine Warfare*, 46 ADELPHI PAPERS 38-46 (1968); Craven, *Working in the Sea*, 64 INT'L SCI. & TECH. 50 (1967).

of Lake Michigan, revealing the existence of a mid-lake sill, glacial boulders, and snowlike precipitation.[63]

D. *Innovations in Weather Forecasting and Modification*

Technological innovations which affect weather research include the utilization of orbiting weather satellites (TIROS, ESSA, HIMBUS) and improvements in buoy and other sensor technology for data gathering purposes. The net result, therefore, is to permit a potentially global observation which was heretofore impossible.[64] Apart from this development, perhaps the greatest concern is being focused on patterns of ocean circulation and their relationship with the exchange of heat between the atmosphere and the oceans.[65] It appears that it is this relationship which is crucial for understanding and predicting weather patterns — and particularly for understanding the generation of large-scale weather disturbances like hurricanes and typhoons.[66]

The need for more knowledge in this area is necessary not only for improving forecasts, but it is also crucial to attempts to modify the weather in different ways; the most dramatic example of which may be the plans to seed hurricanes. The great problem here, however, relates to the uncertainty of the behavior of the hurricane after it is seeded and the probable damage to countries in its path with the possible subsequent liability of the country sponsoring the research. There is agreement among scientists that the experiments which are conducted should not lead to irreversible results.[67]

V. THE IMPACTS OF RECENT TECHNOLOGICAL INNOVATIONS ON THE LAW OF THE SEA

It is clear that the thrust of all trends and technological innovations discussed above has been to extend the jurisdiction of the coastal state beyond traditional limits and to stimulate increasing national claims for even greater exclusive controls. Some agreement has been made that this will facilitate the efficient exploitation of oil and gas and minerals given the need of these industries for long term security and predictability in their activities — a result of the magnitude of the investment required. But if one looks at the problem from a global perspective that includes other uses and users,

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[63] Arnold, *Manned Submersibles for Research,* 158 SCIENCE 84-95 (1967).

[64] *See* THE NATIONAL COUNCIL ON MARINE RESOURCES AND ENGINEERING DEVELOPMENT, UNITED STATES ACTIVITIES IN SPACECRAFT OCEANOGRAPHY, Oct. 1, 1967 (pamphlet).

[65] NAS/NRC, INTERACTION BETWEEN THE ATMOSPHERE AND THE OCEANS 1-4 (pub. No. 983, 1962).

[66] Miller, *Characteristics of Hurricanes,* 157 SCIENCE 1389-99 (1967).

[67] *See* the comments by Dr. Athelstan Spilhaus, at the 1st Mershon Conference, Vol. II, at D15-D19 (Mar. 17-18, 1967).

the attractiveness of this alternative declines.[68] States with major naval capabilities are not likely to find such carving up of the oceans very desirable.

Furthermore, the scientific research requirements of ocean exploration are such that only a coordinated, massive international effort will yield comprehensive results. It is for this reason that President Johnson's proposal for an international decade of ocean exploration was favorably received by the Soviet Union and other countries.[69]

Thus, recent technological innovations have succeeded in bringing questions of ocean policy to the forefront of current international political issues. These questions revolve mainly around the limits of the continental shelf and jurisdiction over the floor beyond the shelf. In other words, the major issues are who gets what, when, where, and how, and the conflicts generated thereby impinge upon the efficiency and feasibility of an international regulation system for fisheries, oil and gas, minerals, transportation and navigation, and security and recreation.[70]

Most recommendations which have been made fall into the four categories, succinctly characterized by Richard Young:

> (1) An extension of the shelf doctrine to all ocean areas, thereby effecting a division of the ocean floor among coastal states fronting on the ocean.
>
> (2) A revision of the occupation theory which would permit acquisitions by individual states, but which would establish by multilateral convention an international registration system for national claims, possibly along with some international controls and some provision for preventing or resolving conflicts.
>
> (3) A vesting of the deep-sea floor in some international agency, which would in effect act like a landlord in granting

[68] For excellent summaries of the major questions involved, see Christy and Brooks, *Shared Resources of the World Community,* in NEW DIMENSIONS FOR THE UNITED NATIONS: THE PROBLEMS OF THE NEXT DECADE (C. Eichelberger ed. 1966); Young, *The Legal Regime of the Deep-Sea Floor,* 62 AM. J. INT'L L. 641-53 (1968); *see also Hearings on Governing the Use of Ocean Space Before the Senate Committee on Foreign Relations,* 90th Cong., 1st Sess. (1967).

[69] N.Y. Times, June 18, 1968, at 23, col. 1.

[70] Full discussions of these questions may be found in: Christy, *The Distribution of the Seas' Wealth in Fisheries,* in THE LAW OF THE SEA, ALEXANDER (1967), at 106-21; F. CHRISTY & A. SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES (1965); SCIENTIFIC COMMITTEE ON OCEANIC RESEARCH OF THE INTERNATIONAL COUNCIL OF SCIENTIFIC UNIONS, INTERNATIONAL OCEAN AFFAIRS: A SPECIAL REPORT (1967); THE FUTURE OF THE SEA'S RESOURCES (L. Alexander ed., 1968); Christy, *Economic Criteria for Rules Governing Exploitation of Deep Sea Minerals,* 2 INT'L LAWYER 224-42 (1968); W. Chapman, Problems of North Pacific and Atlantic Fisheries, May 10, 1967 (unpublished paper presented at the Annual Meeting, Fisheries Council of Canada, Montreal, Canada); D. Cheever, The Role of International Organizations in Ocean Development, Oct. 5, 1967 (unpublished paper presented to the 2d Mershon Conference); F. Christy, Realities of Ocean Resources, July 27, 1967 (unpublished paper presented to the Marine Frontiers Conference, University of Rhode Island, July 27-28, 1967); F. Christy, Alternative Regimes for the Minerals of the Sea Floor, June 8, 1967 (unpublished paper presented to the American Bar Association, National Institute on Marine Resources).

licenses, leases, or concessions to explore and exploit the mineral resources in specified areas.

(4) A vesting of the deep-sea floor in an international agency which would itself carry on exploration and exploitation activities.[71]

We should realize, however, that whatever resolutions are finally decided upon will have to accommodate the national security interests of all participants, particularly those with wide-ranging naval capabilities. It is clear that the United States Navy would prefer to place rather restrictive limits on the extent of exclusive national jurisdiction in the ocean,[72] and it is reasonable to assume that in the near future the Soviet Union may also adopt this position given the recent substantive inputs into the Soviet naval program and their increasing activity in the Mediterranean Sea and the Indian Ocean. Proposals, therefore, which look to the Antarctica and Outer Space arrangements as models for the ocean do not take sufficient account of the much different role of the oceans as a strategic military arena when compared with the other two.

As in the field of space exploration,[73] the smaller nations, especially the newly independent ones, have had and will continue to have a considerable role in reshaping the law of the sea. The fact that many of these are also coastal states gives further impetus to the current trend of the extension of national jurisdiction over the ocean. Therefore, future conflict over the exploitation of coastal fisheries, the continental shelf, and the deep ocean floor may be greater between those states on opposite sides of the capability dimension. It may be, too, that as the fruits of exploitation grow, the less capable will perceive the stakes as being so high that the incentive to go to war over alleged intrusions may be greater unless some apparatus exists which attempts to maximize the distribution of values for all participants. However, the recent United Nations efforts to regulate activities in the use of ocean space show promise toward establishing an international mechanism to encourage peaceful uses in this fertile area.[74]

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[71] Young, *supra* note 68, at 647-48.

[72] *See* Michael, *Avoiding the Militarization of the Sea* in NEW DIMENSIONS FOR THE UNITED NATIONS: THE PROBLEMS OF THE NEXT DECADE, at 167 (C. Eichelberger ed., 1966); K. Frosch, Military Uses of the Ocean, 9 Oct. 5, 1967 (unpublished paper presented to the 2d Mershon Conference); L. Zeni, Defense Needs in Accomodations Among Ocean Users (unpublished paper presented to the Third Annual Law of the Sea Institute, 1968).

[73] *See* E. Miles, Development of Legal Regimes to Guide Space Exploration, Aug. 28, 1968 (unpublished paper presented to the American Institute of Aeronautics and Astronautics Conference on the Impact of Aerospace, Science and Technology on Law and Government, Washington, D.C., Aug. 28-30, 1968).

[74] For recent discussions, see Nanda, *Peaceful Uses of Ocean Space*, 9 VA. J. INT'L L. 000 (1969); Panel, *Whose Is the Bed of the Sea*, 62 PROC. AM. SOC'Y INT'L L. 214 (1968).

THE "XYY SYNDROME": GENETICS, BEHAVIOR AND THE LAW

BY KENNETH J. BURKE*†

Certain persons have been discovered who possess more or less than the normal complement of two sex chromosomes. The probable incidence of males possessing an XYY complement (XY being normal) of sex chomosomes has been estimated at 1:1000 by most authorities. However, a much larger incidence of this complement has been found in institutionalized individuals and studies have suggested a strong correlation between anti-social behavior and the XYY individual. Furthermore, the relationship of genetics and biochemistry to behavior may suggest that the presence of an extra Y chromosome could be a cause of the anti-social behavior observed in XYY males.‡ The question thus arises: is the male, possessing the extra Y chromosome, criminally responsible for his anti-social acts? The present tests for legal insanity stress cognitive and/or volitional elements. Perhaps under a test such as M'Naghten, which recognizes only cognitive behavior, the XYY individual may be able to successfully argue for the inclusion of a volitional element on the constitutional ground of due process.

PROLOGUE

ON April 21, 1968, The New York Times carried a front page article beginning with the words: "The murder of a prostitute by a stable hand in a cheap Paris hotel has opened a twilight zone of criminology for unsuspecting jurists and scientists."[1]

The article described the murderer as possessing an extra Y chromosome which, it was thought, might predispose him to commit violent acts. The story thus exhumed the age-old question of whether criminals are born rather than made, and if born, to what extent one's genetic nature might diminish his criminal responsibility in a traditionally nurture-oriented legal system. The report quoted Berkeley geneticist Dr. Curt Stern's interesting speculation that woman's gentility is attributable to the absence of a

* Member, Feldhamer & Hochstadt, P.C., Denver and Buena Vista, Colorado; Member, Colorado Bar; B.S., Holy Cross College, Worcester, Mass., 1961; J.D., University of Denver, 1969.

† The author is indebted to W. R. Matoush, Ph.D., staff member, Denver Law Journal, for his contribution to the discussion on genetic and biochemical topics contained in Section III, PHYSIOLOGICAL RELATIONSHIP OF XYY TO BEHAVIORAL ABNORMALITY as well as the probability figure contained in table 2.

‡ For a recent survey article concerning the XYY male, incorporating published and unpublished data, see Brown, *Males with an XYY Sex Chromosome Complement*, 5 J. MED. GENETICS 341 (1968).

[1] N.Y. Times, Apr. 21, 1968, at 1, col. 3.

Y chromosome, while a double complement of the male-determining Y may perhaps explain overly-aggressive behavior.[2]

The next day, it was reported that Richard F. Speck, convicted of the 1966 Chicago murder of eight nurses, also possesses an extra Y chromosome, and that his lawyers were considering raising the issue on appeal.[3] This article painted a picture of the XYY offender as being a tall, mentally dull, aggressive, sometimes violent individual likely to be afflicted with facial acne. These reports set off a wave of speculation in the practicing as well as in academic circles of the legal profession, heightened by the announcement that an Australian XYY defendant was acquitted in a case involving genetic structure as an indication of insanity.[4]

In view of the spate of concern generated by such news articles, the purpose of this inquiry is to analyze available scientific data to determine *first* whether there is a positive correlation between the extra Y chromosome and antisocial behavior, and *second* whether the correlation is significant enough to present an adequate defense to a criminal charge.

I. THE SEX CHROMOSOMES[5]

Of the 46 chromosomes found in each human cell, two are termed the sex chromosomes, of which the normal female possesses two X-type, or an XX complement, and the normal male possesses one X and one Y-type, or an XY structure. Occasionally, however, individuals are discovered with more or less than the normal compliment of two sex chromosomes, and within the past seven years, individuals as varied as XO (only one X), XXX, XXXX, XXY, XYY, XXYY, and XXXXY have been described and confirmed. Furthermore, it is also possible that not all of an individual's cells will carry the same sex chromosome complement, and such an individual is referred to as a "mosaic" because of his uniquely varied genetic structure.[6]

The chromosomal structure is analysed by a process known

[2] *Id.* at 72, col. 6.

[3] N.Y. Times, Apr. 22, 1968, at 43, col. 3. This report has never been confirmed in any of the scientific journals. Ironically, Speck is reported to carry a chest tattoo bearing the legend "Born to Raise Hell."

[4] TIME, Oct. 25, 1968, at 76. This report also informed us that the above-described Parisian murderer was convicted and sentenced to seven years, notwithstanding his abnormal genetic structure.

[5] Unless otherwise indicated, the source of the material presented in this section is M. BARTALOS & T. BARAMKI, MEDICAL CYTOGENETICS (1967).

[6] For examples of genetic mosaics, *see* Court Brown *et al., Fertility in an XY/XXY Male Married to a Translocation Heterozygote,* 1 J. MED. GENETICS 35 (1964); Cox & Berry, *A Patient with 45XO/48XYYY Mosaicism,* 4 J. MED. GENETICS 132 (1967); Kajii *et al., XY/XYY Mosaicism in a Pre-Pubertal Boy with Tall Stature, Prognathism, and Malformation of the Hands,* 41-2 PEDIATRICS 985 (1968).

as karyotyping, which is accomplished through the following steps:

(1) culturing[7] the skin or blood cells of the subject to be studied,

(2) photographing the stained chromosomes, and

(3) rearranging the photographed chromosomes to fit a standard, international pattern.

Although the link between chromosomal defects and *physical* abnormalities is well known for many conditions such as albinism[8] or acondroplastic dwarfism,[9] direct evidence linking genetics with mental and *behavioral* problems is relatively new. Exemplifying a genetic condition which combines severe physical and mental defects in mongolism (Down's Syndrome), which has been found to be associated with an extra chromosome (number 21 in the karyotype).[10]

Regarding the sex chromosomes in particular, since only those individuals whose X structure was altered were found to be acutely abnormal or troublesome, it was generally felt that the Y chromosome carried relatively little genetic information.[11] In studies of multiple sex chromosome conditions, geneticists had devoted the greater proportion of their time to the X chromosome, much effort having been expended in the study of "chromatin-positive" males (those with two or more X chromosomes) in an effort to discover a link between the extra X chromosome and mental deficiency,[12] especially since there appeared to be no notable differences between patients with either XXY or XXYY structure.[13]

II. THE XYY COMPLEMENT

The first XYY individual noted in the medical literature[14] appears to have come to light in 1961 after his chromosomal con-

[7] It is during the division process known as mitosis in which two identical cells are produced from a parent cell, the primary genetic material being distributed equally to each daughter cell. During the metaphase of the mitotic process, the chromosomes align themselves in an equatorial plane of the cell, and are most easily distinguished. The chromosomes are then stained to facilitate examination, and to highlight the differences between each type.

[8] A. MONTAGU, HUMAN HEREDITY 235-36 (1963).

[9] *Id.* at 269.

[10] "All patients with this characteristic phenotype . . . have all or most of chromsome 21 triply represented rather than doubly . . . ." V. MCKUSICK, HUMAN GENETICS 18 (1964).

[11] Telephone interview with Dr. Arthur Robinson, geneticist, at the University of Colorado Medical Center, Denver, Colo., Oct. 16, 1968. *Cf.* G. VALENTINE, THE CHROMOSOME DISORDERS 91 (1966).

[12] Maclean *et al., A Survey of Sex-Chromosome Abnormalities Among 4514 Mental Defectives,* LANCET, Feb. 10, 1962, at 293.

[13] Either of these double-X male structures produces what is known as "Klinefelter's Syndrome," characterized by some mental retardation, development of breasts, high-pitched voice, and increased social problems with advancing age.

[14] Sanberg *et al., An XYY Human Male,* LANCET, Aug. 26, 1961, at 488; *See also* Haushka *et al., An XYY Man with Progeny Indicating Familial Tendency to Non-Disjunction,* 14 AMER. J. HUMAN GENETICS 22 (1962).

stitution was examined because he fathered at least one defective or abnormal child during each of his two marriages. The subject, a 45-year-old white male, was described as being of average intelligence, and aside from his difficulty in satisfying employers, he appears to have been normal in all respects. Aside from confirming the existence of the XYY karyotype, this case appears to have passed relatively unnoticed by the medical community, and was probably considered to be further evidence of the absence of congenital defects and small gene content associated with the Y chromosome.

In 1965, investigators discovered a high incidence of XXYY individuals in an institution for violent or aggressive subjects who were also mentally subnormal.[15] This study prompted an inquiry by Dr. Patricia Jacobs and her colleagues who discovered seven of the 197 inmates of a maximum security hospital to have XYY karyotypes.[16] Since then, numerous studies have been completed in various countries.

A. *Statistical Evidence of XYY Relationship to Behavioral Abnormality*

Out of a total of 967 institutional and other subjects surveyed by karyotyping, 50 postpubescent individuals were found whose chromosomal structure was either totally XYY or, in the case of mosaics, was dominated by 80 percent or more XYY cells. The survey data are collected in Tables 3, 4, and 5 of the appendix. Since many of the studies reported different information concerning the same subjects, great care was taken not to duplicate individuals in the tables, and where doubt has arisen concerning an overlapping area, those individuals were eliminated from consideration.

Before considering the data further, it would be well to discuss briefly the incidence of this defect. Estimates of the incidence of the XYY complement in the general population run from as low as 1:2000[17] or 1:1500[18] to an unofficial high of 1:300.[19] Geneticists are reluctant to accept this latter figure since it does not correspond to the known incidence of similar chromosomal disorders, and it appears that chromosomal defects come in un-

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[15] Casey *et al., Sex Chromosome Abnormalities in Two State Hospitals for Patients Requiring Special Security,* 209 NATURE 641 (1966). The authors noted that the extra Y chomosome might also be responsible for the height difference noted between XXY and XXYY individuals.

[16] Jacobs *et al., Aggressive Behavior, Mental Sub-normality, and the XYY Male,* 208 NATURE 1351, 1352 (1965).

[17] Slater, 2 WORLD MEDICINE 44 (1967).

[18] Jacobs *et al., supra* note 16, at 1352.

[19] N.Y. Times, Aug. 7, 1968, at 34, col. 1.

predictable clusters.[20] Most authorities agree upon an incidence of 1:1000 as most probable, a figure which equals 0.10 percent of the male population.

A statistical analysis was conducted of the data in Tables 3 and 4, and from the results of that analysis, set out in full in the appendix, a summary of the more important conclusions are presented below and are illustrated in Tables 1 and 2:

Table 1
XYY's In Selected Populations

Institutional		No. XYY's	% XYY's
Ordinary Criminals (C)	108	6	5.56
Ordinary Mentally Ill (M)	24	2	8.33
Both Mentally Ill and Antisocial (MI)	679	22	3.18
Mentally Subnormal and Antisocial (MS)	115	13	11.3
Total Institutional	926	43	4.32
Total Non-Institutional	36	0	0
Total Population	962	43	4.16
Other XYY's (Table 5)	7	7	
Total Subjects	969	50	

1. Heights of XYY Individuals

The statistics indicate a marked positive correlation of height with incidence of XYY. The average height of XYY's ranged from 71.1 inches to 75.6 inches, depending on whether height was a factor in the sampling process. This is in contrast to the normal average male height (British subjects) of approximately 67 inches.[22]

2. Incidence of the XYY Syndrome

Summarized in Table 1 are the incidence rates for XYY among various samples of the surveyed population. Based on an estimated incidence of 1:1000 for this condition in the normal population, the probabilities of the indicated rates of incidence are also shown.

3. Behavioral Characteristics of XYY Individuals

Of the 50 XYY's discovered in the surveyed population, only one can be classed as behaviorally normal. A large majority (45) are given the general designation, "antisocial," but in reality, the remaining five, with such varied problems as obsessive-compulsive overaggressiveness, impulsiveness coupled with mental retardation or merely difficulties in holding employment, might also be classed

[20] Robinson interview, *supra* note 11.

[21] P. HOEL, INTRODUCTION TO MATHEMATICAL STATISTICS 37-39 (1947).

[22] H. KALMUS, GENETICS 41 (1964).

TABLE 2

XYY Syndrome — Summary of Statistical Analysis

Population Surveyed	No Height Limitation in Sampling			Some Height Limitation in Sampling		Minimum Height Used in Sampling	
	Fraction XYY's	Percent XYY's	*Probability of This Incidence by Chance Alone	Fraction XYY's	XYY's Percent	Fraction XYY's	Fraction XYY's
All Individuals	43/962	4.16	4.9×10^{-55}	30/383	7.83	11/177	10.7 (72")
Institutional	43/926	4.32	9.4×10^{-56}				
Non-Institutional	0/36	0	0.96				
Criminal	6/108	5.56	1.7×10^{-9}				
Mentally Ill	2/24	8.33	2.7×10^{-4}				
Mentally Ill and Antisocial	22/679	3.18	6.6×10^{-26}	11/160	6.88	6/62	9.68 (72")
Mentally Subnormal and Antisocial	13/115	11.3	4.4×10^{-23}			13/115	11.3 (71")

*Based on estimated XYY incidence of 1:1000 in the general population, computed by use of $P(x) = \frac{n!}{x!(n-x)!} p^x q^{n-x}$, where $P(x) =$ probability of exactly x successes when drawing a sample of n persons from the population, where p is the probability of success and q, of failure on each draw.[21]

in that general category. As thus viewed, 49 of 50, or 98%, were found to be in some way behaviorally abnormal to a significant degree.

The data on the incidence of XYY among institutionalized individuals suggests a strong positive correlation between antisocial behavior and the XYY individual, a correlation which increases significantly with increased stature. Furthermore, although it appears that there is a controlling source bias in attempting to formulate any relationship with intelligence, the evidence is strong that the extra Y chromosome does have some effect on one's behavior. Indeed, the opinions of the active investigators ranged from firm, yet cautious confidence in the relationship[23] to scientific reticence concerning the term "YY Syndrome."[24] Most authorities would agree that the XYY is more likely than not to be significantly taller than his parents,[25] at best disinvolved, but probably aggressive and reacting more often against property than against the person. They would further agree that the XYY's antisocial behavior is likely to exhibit itself at a relatively early age[26] which, coupled with the conspicuous absence of crime among the siblings of the XYY's,[27] lends credence to the proposition that their deviant behavior is more influenced by genetic rather than environmental factors.

Other findings which may prove of future value in describing or treating the XYY individual, but which have not yet been studied widely enough to be reliable, are a significantly different reading in some parts of the electrocardiogram,[28] and abnormal electroencephalograms.[29] One of the most intriguing preliminary findings is an apparently direct relationship between sex chromosomes and

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[23] "Therefore we believe the XYY karyotype can be correlated with height and unusual behavioural problems . . . ." Borgaonkar *et al., The YY Syndrome,* LANCET, Aug. 24, 1968, at 461,462; "The freqency . . . indicates that an extra Y chromosome has a part to play in antisocial behaviour . . . ." Casey *et al., YY Chromosomes and Antisocial Behaviour,* LANCET, Oct. 15, 1966, at 859, 860; "We have no doubt, nevertheless, that there is some form of link between an extra Y chromosome and antisocial conduct . . . ." Forssman *et al., The YY Syndome,* LANCET, Oct. 5, 1968, at 779; "[c]onfirms Court Brown's proposal that . . . the XYY complement perhaps influences behaviour rather than intelligence." Leff & Scott, *XYY and Intelligence,* LANCET, Mar. 23, 1968, at 645; "[I]t seems reasonable to suggest that their antisocial behaviour is due to the extra Y chromosome." Price & Whatmore, *Criminal Behavior and the XYY Male,* 213 NATURE 815 (1967).

[24] Kelly *et al., Another XYY Phenotype,* 215 NATURE 405 (1967).

[25] *See* Borgaonkar *et al., supra note* 23, at 462.

[26] *See* Price & Whatmore, *supra* note 23.

[27] *Id.*

[28] *See* Borgaonkar *et al., supra* note 23; Price,*The Electrocardiogram in Males with Extra Y Chromosomes,* LANCET, May 25, 1968, at 1106.

[29] *See* Cowie & Kahn, *XYY Constitution in Prepubertal Child,* 1 BRITISH MED. J. 748 (1968); Mintzer & Sato, *The XYY Syndrome,* J. PEDIATRICS, Apr., 1968, at 572; Welch *et al., Psychopathy, Mental Deficiency, Aggressiveness and the XYY Syndrome,* 214 NATURE 500 (1967).

fingerprints,[30] which led at least one observer to comment wryly: "A fascinating thought is that, since it is known now that an extra Y chromosome may predispose its possessor to commit crimes, finger-print clues could be used simultaneously for detection and diagnosis of the thief — at least in science fiction."[31]

While it is well known that certain chromosomal defects are closely and intimately associated with the regular production of detectable effects upon the organism as a whole,[32] the *biochemical* cause (as opposed to the *descriptive* cause associated with any one-to-one correspondence) appears to be shrouded in mystery, although more knowledge is continually being accumulated.[33] It *is* known, however, that chromosomes carry the genetic information which determines the structure and duplication of body chemicals,[34] and it is also known that the presence or absence of certain chemicals in the human brain is intimately associated with behavioral changes, although this field of inquiry requires far more investigation in order to be conclusive.[35] It is interesting to speculate that, if and when discovered, the biochemical cause of overly aggressive behavior might possibly be controlled through the administration of proper drug therapy.

Using the aforementioned figure of 1:1000 as an expected incidence to interpret the survey results, the overall rate for XYY's of 4.32 percent (Table 2) of all anti-social (institutional) types surveyed is 43.2 times higher than would be expected in the general population. Similarly, this figure rises to 78.3 times the expected incidence when we include some minimum height restriction, and to 107 times the expected incidence when the minimum height is restricted to 6 feet. Estimates of the probability of drawing the identified XYY's from a normal population solely by chance indicate an extremely small probability that the results are merely fortuitous. Moreover, if there were no difference between the

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[30] *See* Alter, *Is Hyperploidy of Sex Chromosomes Associated with Reduced Total Finger Ridge Count?*, 17 AMER. J. HUMAN GENETICS 473 (1965); Hunter, *Finger and Palm Prints in Chromatin Positive Males*, 5 J. MED. GENETICS 112 (1968); Penrose, *Medical Significance of Finger-prints and Related Phenomena*, 2 BRITISH MED. J. 321 (1968).

[31] Penrose, *supra* note 30, at 324.

[32] *See* McKUSICK, *supra* note 10. *See generally,* BARTALOS & BARAMKI, *supra* note 5.

[33] The biochemical cause of the genetically-linked disease phenylketonuria, for example, is attributed to untoward changes in brain chemistry; *see* McKUSICK, *supra* note 10, at 69. Testing of the newborn for this disease, required by COLO. REV. STAT. ANN. §§ 66-27-1 *et seq.* (Supp. 1965), can result in the elimination of the severe mental retardation produced by the malady, through the use of proper diet therapy, involving reduced intake levels of the amino acid phenylalanine.

[34] *See* McKUSICK, *supra* note 10, at 61.

[35] *See* Mandell *et al., Psychochemical Research in Man*, 162 SCIENCE 1442 (1968).

observed incidence and the incidence in the general male population, the figure 4.32 percent indicates a tremendous societal problem, particularly since psychiatric treatment does not appear to help many of these individuals.[36]

III. Physiological Relationship of XYY to Behavioral Abnormality

While the statistical evidence that has been collected shows a strong correlation between the XYY condition and antisocial behavior, a more satisfying demonstration of a cause and effect relationship would rest upon the demonstration of an actual biochemical mechanism for behavioral aberrations traceable to the presence of the XYY chromosomal complement. Clear evidence of such a mechanism is not yet available, however; hence any discussion of the available data in this area is necessarily quite speculative.

A. *The Relationship of Genetics and Biochemistry to Behavior*

Although many workers in the field would ascribe considerable importance to environmental factors,[37] a genetic origin has been suggested for many aspects of general behavior. Such specific psychological illnesses as amaurotic family idiocy and Huntington's chorea[38] have been shown to follow classic hereditary patterns, while other illnesses with mental or behavioral implications, such as phenylketonuria (PKU)[39] and galactosemia[40] have been traced to metabolic disturbances which very likely have a genetic origin.

Perhaps of greater significance, however, are the studies which indicate possible genetic or biochemical bases for schizophrenia and manic-depressive psychosis. Extensive statistical analysis of studies involving identical and fraternal twins has indicated that a strong "genetic factor" is indicated in schizophrenia,[41] although this factor does not follow classical Mendelian patterns but is explicable on the hypothesis that genetically predisposed individuals will develop schizophrenia if subjected to sufficient environmental stress. Less

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[36] Nielsen, *The XYY Syndrome in a Mental Hospital,* British J. Crim., Apr., 1968, at 186; *see* Price & Whatmore, *Behaviour Disorders and Pattern of Crime Among XYY Males Identified at a Maximum Security Hospital,* 1 British Med. J. 533 (1967).

[37] *See e.g.,* J. Coleman, Abnormal Psychology and Modern Life (1956).

[38] *See* A. Maslow & B. Mittelmann, Principles of Abnormal Psychology 117 (1951).

[39] *See* Montagu, *supra* note 8, at 174-76, 365.

[40] *Id.* at 363.

[41] *See* Kallman, *The Genetic Theory of Schizophrenia,* in Readings in Law and Psychiatry (R. Allen, E. Ferster & J. Rubin, eds. 1968) 56-60; Maslow & Mittelmann, *supra* note 38, at 119.

extensive twin studies have suggested a similar genetic factor in manic-depressive psychosis.[42]

From a physiological point of view, schizophrenia has been related to a disturbance in adrenal gland function in which there is a lack of sufficient corticoid hormone secretion to meet stressful conditions.[43] The ability to induce schizophrenic symptomology with such drugs as mescaline and lysergic acid has suggested to some that schizophrenia may result from the presence of certain brain chemicals with properties similar to these drugs.[44] Heath obtained the most impressive physiological results by injecting volunteers with a substance (taraxein) obtained from the blood of schizophrenic patients which induced such schizophrenic symptoms as catatonic reactions, paranoia, disorganization and depersonalization.[45] The onset of symptoms was gradual, reaching a peak between 15 and 40 minutes following the injection and then subsiding. Heath considers the symptoms resulting from tarazein to be more specifically schizophrenic in nature than those resulting from mescaline or lysergic acid, the effects of which he considers more characteristic of toxic psychoses.

The significance to a genogenic argument of these biochemically based explanations of schizophrenia may not become clear until it is pointed out that physiology and body chemistry are fundamentally reflections of one's genetic endowment. That is, genes and chromosomes are the ultimate sources of those biochemical substances (enzymes) which regulate all biochemical processes,[46] which in turn are known to have an effect upon behavior.

Turning again to the XYY syndrome, a strong statistical correlation between the genetic condition and antisocial behavior has been shown. Confirmation of the causal link through the demonstration of a physiological mechanism is not yet possible, although the presumption of a genetic-biochemical relationship is perhaps stronger than with other psychopathologies, since in XYY individuals there is an *observable* chromosomal abnormality with the result that microbial and traumatic pathologies are essentially eliminated.

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[42] *See* MASLOW & MITTELMANN, *supra* note 38, at 121.

[43] *See* COLEMAN, *supra* note 37, at 275; C. MORGAN & E. STELLAR, PHYSIOLOGICAL PSYCHOLOGY 541-42 (1950); *but see* C. MORGAN, PHYSIOLOGICAL PSYCHOLOGY 564 (3d ed. 1965).

[44] *See* COLEMAN, *supra* note 37, at 275.

[45] *Id.* at 276.

[46] *See* E. GARDNER, PRINCIPLES OF GENETICS 259-80 (3d ed. 1968).

B. *Interrelationship of the Sex Chromosomes*

It would be tempting to ascribe the antisocial behavior of XYY's to a masculinizing or more aggressive behavioral influence traceable to an excess of male hormones (androgens), an increase in which would be suggested by the extra Y chromosome. However, since both male and female hormones (estrogens) are present in both sexes,[47] a genetic link for androgens would not be indicated for the Y chromosome. It is nevertheless possible for the Y chromosome to have the function of activating or regulating other gene sites, particularly on the X chromosome. Present scientific theory suggests that unlike the "euchromatin" of gene-bearing chromosomes, which govern specific, Mendelian traits, the so-called "heterochromatin" of the Y chromosome appears to act as a genetic regulator and therefore exerts a quantitative effect which may be the real basis for observable sex differences.[48] Consequently, the presence of the extra Y chromosome may alter a delicately balanced regulatory function, with possibily far-reaching consequences.

Certain genes govern the production of specific physiological intermediates which in turn direct ultimate physiological results. When such genes are "nonfunctional" in whole or in part, as appears to be the case with such diseases as phenylketonuria (PKU) and *diabetes mellitus,* it is presumably the absence or scarcity of gene sites that brings on the symptoms and determines their severity.[49] Conversely, where an *excess* capacity is available for the production of physiological intermediates, it appears plausible that an *overproduction* of gene products will ensue, with or without detectable physiological effects. Returning to the XYY syndrome and assuming that the Y chromosome produces an intermediate activator substance, the presence of two chromosomes in the XYY male presumably makes available *twice* the genetic capacity for the Y-related product, with consequent disruption in the *quantitative* function which has been postulated.

It should be noted that where multiple X chromosomes are concerned (including the case of the normal XX female), only one of the X chromosomes is "euchromatic" and is therefore functioning via Mendelian genes (i.e., conferring specific, qualitative traits).

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[47] *See* U. MITTWOCH, SEX CHROMOSOMES 243-44 (1967).

[48] *See id.* at 238-45, for a discussion of the possible mode of action of sex chromosomes.

[49] *See* Sinsheimer, *The Prospect for Designed Genetic Change,* 57 AM. SCIENTIST 134 (1969).

One well-known theory (Lyon hypothesis)[50] holds that only this *one* X chromosome (whether in the normal XX female or such multiple X complements as XXY and XXX) is genetically active, while the others are not, although the possibility remains that the "inactive" chromosomes may yet retain a *quantitative* function. While multi-X individuals are able to *survive*, the lack of totally normal physiology supports the notion of a secondary quantitative function.

In summary, it may be said that the presence of an extra Y chromosome provides a potential excess capacity for synthesis of genetic products, which *could* be a cause of the type of behavior observed in XYY males. Perhaps it is unnecessary to attempt to define the specific role of the extra Y chromosome, and it may be sufficient to note that chromosomal abnormalities can be expected to cause some degree of disturbance in biochemical-physiological balance, as evidenced by widespread physical and mental abnormalities observable in the individuals affected by other multiple-chromosomal defects, such as mongolism.

The foregoing speculations, while not in the least establishing a physiological cause-and-effect relationship between XYY individuals and antisocial behavior, do suggest a strong probability of such a relationship, especially when the physiological-genetic hypothesis is reinforced by the rather convincing statistics observed earlier. Based upon a consideration of the foregoing presentation, we shall next inquire into the possibility of modifying the present outlook on criminal responsibility, through an analysis of the various tests of insanity and the various constitutional issues involved therein.

IV. THE XYY MALE AND CRIMINAL RESPONSIBILITY

A. *Mens Rea*

One writer has summarized *mens rea* by stating that it is inefficacious and unjust to punish conduct without reference to the actor's mental state. The author noted that the primary problem lies not with the actor's *mens rea,* but with his ability to cope with it.[51] In an exhaustive study of the *mens rea* concept, another writer, recalling the slogan expressed by R.M. Hare that "ought"

[50] MITTWOCH, *supra* note 47, at 242.

[51] Packer, *Mens Rea and the Supreme Court,* 1962 SUPREME COURT REVIEW 107, 148-52. For three conflicting Supreme Court decisions concerning *mens rea, see* Lambert v. California, 355 U.S. 225 (1957); Morissette v. United States, 342 U.S. 246 (1942); United States v. Balint, 258 U.S. 250 (1922).

implies "can,"[52] traced the development of the notion of a "capacity to conform" in terms of the constitutional principles of due process as applied to the concept of insanity.[53] Furthermore, when considered in conjunction with the widening communication gulf between psychiatrists and lawyers,[54] the chaotic results which have obtained with an intent-oriented concept of diminished capacity,[55] and the presumption that courts will continue to embrace some notion of a free will in human affairs,[56] it appears that future developments in the field of criminal responsibility will emerge as modifications of the insanity defense. The remainder of this article will therefore be devoted to an analysis of this defense as applied to the XYY male.

B. *Insanity*

It is evident that an insane person cannot constitutionally be tried for a crime,[57] although the constitutional limitation really prescribes that any test is sufficient if it has some basis in fact which is consonant with state policy.[58] The chief tests of insanity in the

[52] R. HARE, FREEDOM AND REASONS 51 (1963).

[53] Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966).

[54] *See* J. MACDONALD, PSYCHIATRY AND THE CRIMINAL (1958).

[55] People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 916-17, 49 Cal. Rptr. 815, 820-21 (1966) affirmed the principle stated in *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677, 682, 35 Cal. Rptr. 77, 82 (1963) which recognized the significance of a defense not amounting to legal insanity, yet resulting in an amelioration of the M'Naghten approach to criminal responsibility. The *Conley* court approved the rule that the doctrine of "diminished capacity" dealt with the defendant's ability to form the requisite specific intent, specifically when some mental defect (*e.g.*, drunkenness) reduces his ability to comprehend the law's proscription and to understand the obligation to conform his conduct thereto. The doctrine would thus present a defense to a crime if the evidence established such diminished capacity that the defendant could not form the required specific intent. However, in *People v. Talbot*, 64 Cal.2d 691, 414 P.2d 633, 646, 51 Cal. Rptr. 417, 430 (1966) *cert. denied*, 385 U.S. 1015 (1967) and 388 U.S. 923 (1967), the California Supreme Court held that no prejudice resulted from a failure to read to the jury instruction on manslaughter as set forth in the *Conley* case which would have allowed the jury to consider the doctrine of diminished capacity in a felony-murder convicition; *Talbot v. Nelson*, 390 F.2d 801, 803 (9th Cir. 1968) upheld this position in a federal habeas corpus proceeding. In an intervening California appellate court decision, *People v. Aubrey*, 61 Cal. Rptr. 772, 777 (Ct. App., 2d Dist. 1967), it was held that the trial court has committed error "in failing to advise the jury that a deliberate and unprovoked homicide may be manslaughter" due to the diminished capacity of the defendant. Finally, *People v. Muszalski*, 260 Cal. App. 2d 764, 67 Cal. Rptr. 378, 384-86 (Ct. App., 1st Dist. 1968) added more support to the *Conley* decision by indicating that the doctrine of diminished capacity does apply to felony-murder situations, thus leaving California with two somewhat different, yet overlapping, standards of criminal responsibility.

[56] *See e.g.*, United States v. Chandler, 393 F.2d 920, 929 (4th Cir. 1968); *see also* Powell v. Texas, 392 U.S. 514 (1968).

[57] *See* Bishop v. United States, 350 U.S. 961 (1956); Leland v. Oregon, 343 U.S. 790 (1952); People v. McClain, 37 Ill. 2d 173, 226 N.E.2d 21, 24 (1967).

[58] Leland v. Oregon, 343 U.S. 790 (1952).

United States are the M'Naghten, Durham, and "substantial capacity" tests, each of which is explored below.[59]

1. M'Naghten.

In those jurisdictions which rely on the old M'Naghten test[60] or its numerous variants, the essence of the defense requires the accused to prove that, due to a defect of reason, from disease of the mind, he was totally unable either to understand what he was doing or to comprehend the wrongfulness of his act.[61] At least one state has embellished the test with instructions that "care should be taken not to confuse such mental disease with moral obliquity, mental depravity or passion growing out of anger, revenge, hatred, or other motives, and kindred evil conditions, for when the act is induced by any of these causes the person is accountable to the law,"[62] thus confusing the already vague situation with even more nebulous normative judgments. Major critics of this test mention as primary liabilities its overemphasis of the cognitive element[63] and its "all or nothing" approach.[64]

Since the XYY individual apparently has difficulty *controlling* his behavior, it is hard to see the relevance of genetically affected conduct to a cognition test in the first instance, or the weight it would be accorded in the second.[65] Under such circumstances, it is highly unlikely that a successful defense can be predicted upon one's genetic makeup where the test of criminal responsibility is determined under the M'Naghten rules.

2. Durham[66]

In 1954, the District of Columbia Circuit broke with tradition and introduced a test which relieved the defendant of criminal responsibility if the act in question was the product of mental disease or defect. Soon plagued by problems of construction,[67] the

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[59] Although many states include "Irresistible Impulse" with their law regarding the insanity plea, this defense was not considered relevant to the discussion at hand due to the disfavor attending the concept; *see* R. PERKINS, CRIMINAL LAW 756-63 (1957). A further reason for its dismissal is the lack of evidence propounded by the cited medical authorities regarding compulsive behavior as being attributable to the extra Y chromosome and the resultant unwillingness of geneticists to mechanistically attribute compulsive or aggressive behavior to any single genetic defect.

[60] Daniel M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

[61] PERKINS, *supra* note 59, at 746-51.

[62] COLO. REV. STAT. ANN. § 38-8-1(2) (Supp. 1965).

[63] *See* MACDONALD, *supra* note 54, at 26-38.

[64] *See* T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 127-37 (1963).

[65] The issue concerning a defendant's genetic constitution as an XYY was reportedly raised in a recent American proceeding concerned with a rape-homicide charge. TIME, Oct. 25, 1968, at 76.

[66] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) (adopted similar 1870 New Hampshire test, *id.* at 874); *see* PERKINS, *supra* note 59, at 763-65.

[67] *See* Blocker v. United States, 288 F.2d 853, 857-73 (D.C. Cir. 1961) (concurring opinion).

court was forced to redefine the terms "mental disease or defect" to include any abnormal condition of the mind which "substantially affects mental or emotional processes and substantially impairs behavior controls."[68]

The admissibility and evidentiary weight of an XYY genetic structure are evident in the *Durham-McDonald* test and the likelihood that one's genetic composition might present a valid defense to a criminal charge is thus correspondingly increased over that afforded by the M'Naghten rules, although the limitation of this test to "conditions of the mind" may operate to lessen the impact of the modification in the case of an XYY individual.

3. American Law Institute or "Substantial Capacity"

One year before *Durham* was announced, the American Law Institute (A.L.I.) proposed a model standard of criminal responsibility worded as follows:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantiall capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.[69]

Of those states rejecting the opportunity to adopt the new test, some courts maintain that they are bound by statute and that change is for the legislature,[70] while others contend that there was no error in refusing instructions based upon this test.[71]

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[68] McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962); *accord,* Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967). An interesting dictum appears at 446 wherein the court states that a defendant's "genetic structure," *inter alia* may impair his ability to control behavior.

[69] MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962). Alternative (b) to paragraph (1) of MODEL PENAL CODE § 4.01 (Tent. Draft 41 No. 4, 1955) provided the interesting variation either: "to appreciate the criminality of his conduct or is in such state that the prospect of conviction and punishment cannot constitute a significant restraining influence upon him."

[70] State v. Dhaemers, 276 Minn. 332, 150 N.W.2d 61, 66 (1967) (husband convicted of murder of wife and mother-in-law after receiving additional papers concerning divorce proceeding commenced by wife); *accord,* State v. Eubanks, 277 Minn. 257, 152 N.W.2d 453, 457 (1967), *cert. denied,* 390 U.S. 964 (1968). This case interpreted the failure of the legislature to modify *Minn. Stat.* § 611.026 (1965) after *Dhaemers* as indicating adherence to the old rule (sociopath convicted of first degree murder arising out of attempted rape).

[71] *See e.g.,* State v. Lucas, 30 N.J. 37, 152 A.2d 50, 68-69 (1959) (mentally deficient defendant convicted of felony-murder arising out of rectory arson). The court stated: "Until such time as we are convinced by a firm foundation in scientific fact that a test for criminal responsibility other than M'Naghten will serve the basic end of our criminal jurisprudence . . . we shall adhere to it." *Id.* at 68. Note: The M'Naghten test had been adopted in State v. Spencer, 21 N.J.L. 196, 200-13 (O.&T. 1846); *accord,* State v. Poulson, 14 Utah 2d 213, 381 P.2d 93, 94-95, *cert. denied,* 375 U.S. 898 (1963) (former inmate of mental institution convicted of first degree murder arising out of rape-homicide of eleven-year-old girl); State v. White, 60 Wash. 2d 551, 374 P.2d 942, 959-66 (1962), *cert. denied,* 375 U.S. 883 (1963) (sociopath convicted of unprovoked murder of woman arising out of rape-homicide).

Adoption of this test, either by statute[72] or by court decision,[73] has been exceedingly slow in the several states but is is hoped that recent advances in the science of psychiatry will drastically accelerate the required changes.

In contradistinction to the states, however, the federal circuits have not been unwilling to include a volitional element in tests other than that proposed by the A.L.I.,[74] and in fact have adopted the A.L.I. test almost verbatim in at least five other circuits.[75]

It is clear that any test substantially incorporating the A.L.I. approach will grant a distinct advantage to the XYY individual, an advantage not shared by defendants in the state courts. It is with the constitutional implications of this relationship that this article will conclude.

V. THE XYY MALE AND THE CONSTITUTION

In 1952, the Supreme Court in *Leland v. Oregon*[76] noted the prevalence of M'Naghten in the majority of American jurisdictions and indicated reluctance to eliminate it, reasoning that the science of psychiatry had not yet reached the point where its knowledge would require such abandonment as being "implicit in the concept of ordered liberty."[77]

If, however, it is a federally cognizable denial of due process to try an insane person,[78] the question of what constitutes a proper

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[72] ILLINOIS ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1964); MD. ANN. CODE art. 59, § 9(a) (as amended ch. 709 § 1, 1967); MO. ANN. STAT. §§ 552.010, 552.030 (1949 Rev.) (includes volitional element but eliminates "substantial capacity" qualification); VT. STAT. ANN. tit. 13, ch. 157, § 4801 (1959) (substitutes word "adequate" for "substantial"); *but cf.* N.Y. PENAL LAW, ch. 39, § 30.05 (McKinney 1967) (adopting "substantial capacity" test of cognition but rejecting inclusion of words "to conform conduct"; *see* Practice Commentary, *id.* at 48).

[73] Terry v. Commonwealth, 371 S.W.2d 862, 864-65 (Ky. 1963). (Actually this case adopts a rule comprised of "substantial capacity" as applied to M'Naghten and Irresistable Impulse, although the court stated that § 4.01 of the *Model Penal Code* correctly reflected the law.); Commonwealth v. McHoul, 352 Mass. 544, 266 N.E.2d 556, 563 (1967); State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458, 465 (1966). This case gives the defendant a choice between M'Naghten and A.L.I. wherein the state must establish his sanity beyond a reasonable doubt if the former is chosen; upon giving a written waiver, however, the defendant may request the A.L.I. test be given whereupon he then assumes the burden of establishing lack of criminal responsibility "to a reasonable certainty, by the greater weight of the credible evidence." *Id.*

[74] *See* McDonald v. United States, 312 F.2d 847, 851-52 (D.C. Cir. 1962); Feguer v. United States, 302 F.2d 214 (8th Cir.), *cert. denied,* 371 U.S. 872 (1962); Dusky v. United States, 295 F.2d 743, 759 (8th Cir.), *cert. denied,* 368 U.S. 998 (1961).

[75] United States v. Chandler, 393 F.2d 920, 926-28 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680, 688 (7th Cir. 1967); United States v. Freeman, 357 F.2d 606, 625 (2nd Cir. 1966); Wion v. United States, 325 F.2d 420, 430 (10th Cir.), *cert. denied,* 377 U.S. 946 (1963); United States v. Currens, 290 F.2d 751, 774 (3d Cir. 1961) (cognitive element omitted).

[76] 343 U.S. 790, 800-01 (1952).

[77] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[78] Pate v. Robinson, 383 U.S. 375, 378 (1966); *see also* Bishop v. United States, 350 U.S. 961 (1956).

test of insanity should be federally answerable, at least to the extent of prescribing minimum standards in the light of modern knowledge.

The most recent constitutional pronouncement in this area is found in *Powell v. Texas,*[79] an unfortunate 4-1-4 decision affirming the public drunkenness conviction of a defendant who had been similarly convicted approximately 100 times since 1949. For affirmance, four justices[80] distinguished *Robinson v. California*[81] from the case at hand on the primary ground that *Robinson* dealt with a status or condition, while the present case involved potentially dangerous public conduct. The justices also refused to expand the *Robinson* doctrine for the additional reason that it would involve the issuance of a constitutional doctrine of criminal responsibility which, it was felt, would reduce the "fruitful experimentation" of the various jurisdictions regarding insanity, and "freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold."[82] The justices implied that a constitutional defense would probably be presented only if one could establish both an inability to abstain from drinking in the first place and a loss of control over such conduct once begun.[83]

The dissenting justices[84] recognized the need for more knowledge regarding the disease of chronic alcoholism, but argued that it is folly to ignore what is already known. Noting agreement concerning the alcoholic's decreased moral fault, they recognized the futility of solving psychiatric problems with criminal sanctions, and parenthetically point out that a number of things may affect the likelihood of one's becoming an alcoholic, including "hereditary proclivity."[85] Finally, they felt that the protection of *Robinson* ought to preclude punishment of an individual if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic thereof.

Apart from the dicta noted above, *Powell* appears to limit the XYY's eighth amendment argument until such time as more causally linked statistical data become available, unless another

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[79] 392 U.S. 514 (1968).

[80] Warren, C.J., and Marshall, Black, and Harlan, JJ.

[81] 370 U.S. 660 (1962). This case invalidated a statute making it a crime to be addicted to the use of narcotics. The Court based its decision on the cruel and unusual punishment clause of the eighth amendment as applied to the states through the 14th amendment.

[82] Powell v. Texas, 392 U.S. 514, 536-37 (1968). Other factors considered by the Justices, but not made an express basis for their holding were: the lack of agreement concerning the definition of "disease," the lack of treatment facilities, and the need for proper treatment in the event that such a defense is recognized. It should also be noted that the Justices somewhat caustically denounced the unpreparedness of both adversaries. *Id.* at 522.

[83] *Id.* at 522-26.

[84] Fortas, Douglas, Brennan, and Stewart, JJ.

[85] Powell v. Texas, 392 U.S. 514, 561 (1968).

abnormal genetic structure may first be shown to fit the dissent's extension of *Robinson*.[86] If we assume that a true "compulsion" is required in order to present a defense under the *Powell* rationale, however, it is evident that our XYY individual will not fit that test, although forensic psychiatrists may force the facts to meet the test in order to satisfy their sense of justice. On the other hand, *Powell* leaves the due process argument intact, and if we assume that the "fruitful experimentation" of the various jurisdictions has yielded the conclusion that volition is equally as important as cognition in determining behavior, then perhaps we can state that the A.L.I. test prescribes minimum standards of criminal responsibility which are now "implicit in the concept of ordered liberty."

CONCLUSION

The XYY male is more likely than not to be taller than his parents, displaying both nonsocial and anti-social behavior patterns, and tending to react more often against property than against the person. His genetic structure will most likely not present a valid defense in those jurisdictions utilizing the M'Naghten or cognition test, although his chances appear better in the minority of jurisdictions requiring a volitional element, particularly the model test proposed by the A.L.I. In those jurisdictions whose test is based solely upon cognition, it appears that current developments in psychiatry and genetics may enable the XYY individual to successfully argue for the inclusion of a volitional element on the constitutional ground of due process.

It is the author's opinion that substantial changes will eventually be brought about in the area of criminal responsibility based upon current inquiries into behavior control. The author also feels that this enlightened and more humane approach to criminal law will result in a system so different from the one we presently employ, that in retrospect, our present system shall appear as inequitable and antiquated as *trial by ordeal*.

APPENDIX

I. SURVEY OF POPULATIONS FOR XYY

Tables 3 and 4 contain the data collected from surveys of various populations for the XYY anomaly. The surveys were primarily of institutionalized persons, the only noninstitutional population consisting of 36 basketball players all of whom were found to be normal.

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[86] Such a possibility might be presented by linkage of sex-chromosome anomalies with homosexuality.

TABLE 3
XYY's in Selected Populations

Footnote Numbers	Institution and How Surveyed	Subjects' Country	Avg. Ht.	Total No.	Type Class	YY's	%	Conduct Against Property	Arson	Person	Murder	I.Q. –	Avg.	+
87	Prison for Psychiatric Treatment for Criminals – no ht. limitation	England	71.0"	204	MI	2	1.0	2	2	0	0	1	1	
88	Maximum Security Hospital	Scotland		315	MI	9	2.9	(Total Convictions)						
89	for Mentally Ill							81	–	8	1	8	1	
90	– no ht. limitation		71.4"											
91	Institution for Psychologically Abnormal Criminals	Denmark												
	– over 180 cm. (71.1")			37	MI	2	5.4	2	2					
	– over 184 cm. (72.5")			(12)*			16.7							
92	Reform School – taller than 90th Percentile	England		29	C	3	10.3	3	n/r			3		
93	Forensic Psychiatric Ward – over 180 cm. (71.1")	Denmark	75.4"	23	MI	3	13.0	2	1	1	0	1	2	
94	Mentally Subn. and Anti-Soc.	England		50	MS	12	24.0					12		
	Mentally Ill and Anti-Soc.			50	MI	4	8.0							
	Mentally Ill			24	M	2	8.3							
	Criminal – Intermediate Terms			30	C	0	0.0							

C = Ordinary Criminal
M = Ordinary Mentally Ill
MI = Mentally Ill and Anti-Social
MS = Mentally Subnormal and Anti-Social

*Figures in parenthesis contain one or more repetitive entries and should be disregarded in computing total number of subjects surveyed.

TABLE 4
XYY's in Selected Populations (Cont'd)

Footnote Numbers	Institution and How Surveyed	Subjects' Country	Avg. Ht.	Total No.	Type Class	YY's	%	Conduct Against Property	Arson	Person	Murder	I.Q. –	Avg.	+
95	Detention Center for Juv. Dels. – over 71"	U.S.A.		14	C	1	7.15							
96	.....	.....	74.5"	.....	.....	.....	.....	.....	.....	1	0	1		
97	Prison for Mentally Defective	U.S.A.		30	MS	0	0.00							
	Prison			35	C	2	5.72							
	Hospital for Criminally Insane – all over 71"			50	MI	2	4.00							
98	Inst. for Defective Deliquents	U.S.A.												
	– over 72", less than 75 IQ			(10)*	MS	0	0.00							
	– the ten "most aggressive"			(10)*	MS	0	0.00							
	– over 74" (95th percentile)			(20)*	MS	1	5.00							
	Total			35	MS	1	2.86							
99	Basketball Players (Normal)	U.S.A.		36	N	0	0.00							
100	Mentally Subnormal – possibility of overlap, therefore only used in ht. and offense studies	England & Scotland	74.0"	–		–		2	0	2	0			
	Highly Variable Populations		73.6"	–		–		3	0	1	0	2	1	

*Figures in parenthesis contain one or more repetitive entries and should be disregarded in computing total number of subjects surveyed.

C = Ordinary Criminal
N = Ordinary Mentally Ill
MI = Mentall Ill and Anti-Social
MS = Mentally Subnormal and Anti-Social

TABLE 5
Additional XYY's Detected

Footnote Numbers	Institution and How Surveyed	Subjects' Country	Height	XYY's	Remarks	Conduct Against Property	Conduct Against Arson	Conduct Against Person	Conduct Against Murder	I.Q. –	I.Q. Avg.	I.Q. +
101	Inst. for Mental Defectives – examined due to "webbed neck"	U.S.A.		1		1	1[a]	0	0	1		
102	Psychiatric Hospital Class for the Backward	U.S.A.	80.0" 77.5"	1 1	unstable, deviate impulsive	0	0	1	0		 1	1[b]
103	Referred Due to Aggressive Fantasies	Ireland	78.0"	1	depressed, immature	1	0	0	0			1[c]
104	Examined Because of Unusual Height	Sweden	80.8"	1	overly aggressive	0	0	1	0			1[d]
105	Examined Because of Tall Daughters	Mexico	76.8"	1	aggressive, often changes jobs						1	
106	Examined Because of Defective Offspring	U.S.A.	72.0"	1	job trouble						1	

a–suspected arson
b–I.Q. 125
c–I.Q. 118
d–I.Q. 116

Also shown in Tables 3 and 4 are data on the types of criminal conduct exhibited and the intelligence quotient (I.Q.) possessed by the XYY's identified in the surveys. Similar data appear in Table 5 for additional isolated cases of XYY's who have come to light for various reasons.

II. STATISTICAL ANALYSIS OF XYY INCIDENCE

Shown below are statistical results calculated from the data of Tables 3 and 4. These results appeared earlier in more summary form in Tables 1 and 2 and in the accompanying textual materials.

A. *Relationship of XYY to Height*

(1) Of those XYY's discovered without regard to height, the average height was 71.1 inches (5 feet 11 inches); 53 percent were at least 72 inches (6 feet); 6.66 percent were at least 74 inches (6 feet 2 inches).

(2) Of those XYY's whose height was positively measured, the average height was 73.9 inches (6 feet 2 inches); 76.5 percent were at least 72 inches (6 feet); 41.2 percent were at least 74 inches (6 feet 2 inches).

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[87] Bartlett *et al., Chromosomes of Male Patients in a Security Prison,* 219 NATURE 351 (1968).

[88] Price & Whatmore, *supra* note 23.

[89] Price & Whatmore, *supra* note 36.

[90] Price *et al., Criminal Patients with XYY Sex-Chromosome Complement,* LANCET, Mar. 12, 1966, at 565.

[91] Nielsen *et al., XYY Chromosomal Constitution in Criminal Psychopaths,* LANCET, Sept. 7, 1968, at 576.

[92] Hunter, *Chromatin-Positive and XYY Boys in Approved Schools,* LANCET, Apr. 13, 1968, at 816.

[93] Nielsen, *supra* note 36.

[94] Casey *et al., supra* note 23, at 860.

[95] Telfer *et al., Incidence of Gross Chromosomal Errors among Tall Criminal American Males,* 159 SCIENCE 1249 (1968).

[96] Telfer *et al., YY Syndrome in an American Negro,* LANCET, Jan. 13, 1968, at 95.

[97] Telfer *et al., supra* note 95.

[98] Welch *et al., supra* note 29.

[99] Goodman *et al., Chromosomes of Tall Men,* LANCET, June 15, 1968, at 1318.

[100] Court Brown *et al., Further Information on the Identity of 47 XYY Males,* 2 BRITISH MED. J. 325 (1968).

[101] Kelly *et al., supra* note 24.

[102] Borgaonkar *et al., supra* note 23.

[103] Leff & Scott, *supra* note 23.

[104] Forssman *et al., supra* note 23.

[105] Lisker *et al., YY Syndrome in a Mexican,* LANCET, Sept. 14, 1968, at 635.

[106] Hauschka *et al., supra* note 14.

(3) Of those XYY's discovered because of a positive height factor,[107] the average height was 75.6 inches (6 feet 3½ inches).

B. *Incidence of XYY's Among Surveyed Populations*

(1) Of all individuals surveyed, 43/962 or 4.47 percent were XYY.

(2) Of all institutionalized individuals surveyed (with and without a minimum height limit), 43/926 or 4.64 percent were XYY; with some height restriction, 30/383 or 7.83 percent were XYY; with a height limit of at least 6 feet, 19/177 or 10.7 percent were XYY.

(3) Of normal individuals surveyed (Type Class N), 0/36 or 0.0 percent were XYY.

(4) Of all ordinary criminals surveyed (Type Class C), 6/108 or 5.56 percent were XYY.

(5) Of all ordinary mentally ill patients surveyed (Type Class M), 2/24 or 8.33 percent were XYY.

(6) Of those surveyed who were both mentally ill *and* anti-social (Type Class MI), 22/679 or 3.24 percent were XYY; with some height limit imposed, 11/160 or 6.88 percent were XYY; with minimum height limit 72 inches, 6/62 or 9.68 percent were XYY.

(7) Of those tall (at least 71 inches), mentally subnormal, and anti-social individuals (Type Class MS), 13/115 or 11.3 percent were XYY.

C. *Behavioral Abnormality Among XYY's*

1. The fraction 45/50 or 90 percent of the XYY's shown in Tables 3 and 4 were reported as exhibiting highly anti-social behavior. Of the remaining five, one is described as having difficulty satisfying employers,[108] one as very aggressive and often changing jobs,[109] one as obsessive-compulsive and over aggressive,[110] one as mentally retarded, impulsive, and hyperactive,[111] and the remaining one as behaviorally and mentally normal.[112] Of the 50 XYY's reported, the 49 who were in some way abnormal represent 98 percent of the total.

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[107] Not all of these subjects were discovered in surveys. Note the extreme height of some individual XYY's.

[108] Hauschka *et al.*, *supra* note 14.

[109] Lisker *et al.*, *supra* note 105.

[110] Forssman *et al.*, *supra* note 23.

[111] Borgaonkar *et al.*, *supra* note 23.

[112] Court Brown *et al.*, *supra* note 100. It should be noted, however, that this subject was an X-/XYY mosaic, with 80 percent XYY.

2. Where such information was reported, 29/40 or 72.5 percent of the XYY's were considered to have below average intelligence.

3. Where such information was reported, 16/23 or 69.5 percent committed crimes against property, with a large fraction of these crimes involving arson. The studies of pre-pubertal XYY's included a significant tendency to destroy property by arson.[113]

[113]Cowie & Kahn, *supra* note 29 (8½-year old, mentally dull, violently aggressive and destructive, 4' 9" tall child); *see also* Mintzer & Sato, *supra* note 29 (severely malformed 7-year-old child described as very aggressive).

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NOTE

FEDERAL INCOME TAX LAW IN FUTURE INTEREST TRANSACTIONS

INTRODUCTION

FUTURE interests are generally associated with estate and gift taxes and do not as frequently become a factor in the determination of taxable income as defined in the *Internal Revenue Code*.[1] In fact, narrowing the subject to income tax problems does not avoid consideration of the estate and gift tax provisions of the *Code*, because federal income tax law in this area relies heavily upon the theories and practices developed for estate and gift taxation. The income tax basis of a future interest in property will frequently be derived from an estate tax valuation.

Future interest income tax problems can be divided into two categories. The first involves measurement of the taxable gain or loss to be reported upon the sale, exchange, or release of a deferred property interest. The second involves computation of the deduction from income to reflect a contribution to charity of a property interest with intervening rights reserved to the donor. Many mechanical procedures are common to both areas.

I. MEASUREMENT OF GAIN OR LOSS

A. *General Principles*

Taxable gain measurement axioms dictate elimination from the "amount realized"[2] of that portion which represents a return of capital to the vendor. Computation of the amount of this portion, that is the tax "basis"[3] of the property being given up, relies upon rules exclusive to future interest transactions.

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[1] INT. REV. CODE OF 1954, § 63.

[2] *Id.* at § 1001. This section provides for the determination of the amount of and recognition of gain or loss.

[3] *Id.* at §§ 1012, 1014, 1015. Section 1012 provides that "[t]he basis of property shall be the cost of such property, except as otherwise provided . . . ." Sections 1014 and 1015, respectively except from the cost rule property acquired from a decedent and property acquired by gifts and transfers in trust.

In considering future interests, it is imperative to distinguish between problems in determining the basis of a party holding a fractional interest (hereinafter referred to as original basis problems) and problems in determining how much basis must be allocated to a disposition of a fractional interest when the basis previously determined includes a greater interest than that being conveyed. Valuation devices for establishing the fair market value of fractional interests in property are to be explored in subsequent sections of this paper.

Many future interests find their origin in trust instruments, and in applying rules for establishment of the original basis of "property acquired by gifts or transfers in trust,"[4] an important area of exceptions must always be considered. Under certain conditions inter vivos transfers will be construed under the federal tax statutes as incomplete until the date of the grantor's death, and in these situations the gift property will take basis under the rules established relative to property acquired from a decedent.[5] Important examples involve cases where the grantor retained a reversionary interest and cases where certain facts can create statutory presumptions that the gift was made "in contemplation of death."[6]

B. *Estate Tax Original Basis Considerations*

1. Statutory Foundation

The general rule with regard to determining the basis of property acquired from a decedent is that the property takes its basis from "the fair market value of the property at the date of the decedent's death"[7] (or optional valuation date one year after the date of death).[8]

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[4] *Id.* at § 1015. For a treatment of the taxation of trusts see, Note, *Federal Income Taxation of Estates and Trusts,* 43 DENVER L.J. 183 (1966); and Gelband, *Taxation of Trust Income,* N.Y.U. 24TH INST. ON FED. TAX. 233 (1966).

[5] INT. REV. CODE of 1954, § 1014(b). On providing for establishing the basis of property acquired from a decedent, § 1014(b) enumerates acquisitions which "shall be considered to have been acquired from or to have passed from the decedent" even though actually acquired by intervivos transfer.

[6] *Id.* at § 2035.

[7] *Id.* at § 1014(a).

[8] 7 Treas. Reg. § 1.1014-1(a) (1957). The regulation states: "The purpose of section 1014 is, in general, to provide a basis for property acquired from a decedent which is equal to the value placed upon such property for purposes of the Federal estate tax."

The general rule is effectively expanded when considering future interest valuation problems. The *Code* provides that "[p]roperty passing without full and adequate consideration under a general power of appointment exercised by the decedent by will" will be treated for basis purposes as property acquired from the decedent.[9] Similar treatment may be accorded property acquired by non-exercise of a general power if the donee died after December 31, 1953.[10] In these cases the property is deemed to have been acquired on the estate tax valuation date. In other cases of property acquired under a power of appointment, the tax basis will be established as if the property had been acquired by gift from the creator of the power.

Obviously, the regulation governing estate tax valuations will be instrumental in determination of the original tax basis of a substantial portion of the future property interests which become involved in income tax transactions.[11] Section 1 of the regulation sets forth the basic rule for valuation: "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the relevant facts."[12] The regulation continues to enumerate specialized methods for valuation of specific classes of property.[13]

The final section of the regulation provides for "valuation of property not specifically described in §§ 20.2031-2 to 20.2031-8 . . . ."[14] These residual properties are to be valued "in accordance

[9] INT. REV. CODE of 1954, § 1014(b)(4).

[10] *Id.* at § 1014(b)(9).

[11] Although it is recognized that other methods exist for determining basis to compute taxable gain or loss, this paper will concentrate on a discussion of estate tax valuations.

[12] Treas. Reg. § 20.2031-1(b) (1958). The regulation goes on to say: "Thus, in the case of an item of property includible in the decedent's gross estate, which is generally obtained by the public in the retail market, the fair market value of such an item of property is the price at which the item or a comparable item would be sold at retail."

[13] *Id.* Section 2 provides for valuation of stocks and bonds, § 3 for interests in business, § 4 for notes, § 5 for cash on hand or on deposit, §6 for household and personal effects, § 7 for annuities, life estates, terms for years, remainders and reversions, and § 8 for certain life insurance and annuity contracts and shares in an open-end investment company. All of these sections are but specialized methods for determining fair market value at the retail price.

[14] *Id.* at § 20.2031-9 (1958).

with the general principles set forth in § 20.2031-1"[15] quoted above. Section 9 of that regulation continues: "For example, a future interest in property not subject to valuation in accordance with the actuarial principles set forth in 20.2031-7 is to be valued in accordance with the general principles set forth in Section 20.2031-1."[16]

2. Actuarial Method

From the preceding quote, the question arises: what future interests *are* subject to valuation in accordance with actuarial principles? Actuarial methods are not a substitute for establishing time periods which are more accurately predictable.[17] Thus, a standard discount rate to establish the present value of a future interest is not satisfactory, nor necessary, when such value can be arrived at with certainty.[18] However, actuarial methods are adequate tools for the determination of the present value of a future interest not otherwise ascertainable.[19]

However, the appropriateness of the actuarial method where factors are uncertain has long been established. Judge Learned Hand summarized the philosophy in 1943:

> When compelled to take present action based upon forecasts of a man's life, courts have long been accustomed to use mortality tables; for, although logicians may say that probability never tells us anything about a given instance, in fact we never make a decision, or take a step, except in reliance upon it; and it so happens that in this particular matter the probability has been refined by averaging an enormous number of instances.[20]

The Commissioner's tables, to which various income tax as well as estate and gift tax regulations refer, are released by the Internal Revenue Service.[21] Tables I and II are published in the

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[15] *Id.* The corresponding regulation section dealing with actuarial valuation of gifts is Treas. Reg. § 25.2512-5 (1958).

[16] *Id.* at § 20.2031-9 (1958).

[17] See discussion in text § II(B)(3) *infra.*

[18] That is, if the time when the interest is to be enjoyed is definite and not dependent upon the death of some person, actuarial methods are not to be used.

[19] It must be remembered that Treas. Reg. §§2031.2-6, 8 set forth specific methods for arriving at fair market value. Hence, any resort to actuarial methods in § 7 must be in situations extraneous to those enumerated in the foregoing sections.

[20] Bankers Trust Co. v. Higgins, 136 F.2d 477, 479 (2d Cir. 1943).

[21] IRS Publication No. 11, Rev. 5-59.

estate tax regulations[22] and supplemented by Publication No. 11.

[22] Treas. Reg. § 20.2031-7 (1958). The two tables are:

TABLE I

Table, single life, 3½ percent, showing the present worth of an annuity, of a life interest, and of a remainder interest.

(1) Age	(2) Annuity	(3) Life estate	(4) Remainder	(1) Age	(2) Annuity	(3) Life estate	(4) Remainder
0	23.9685	0.83890	0.16110	53	13.8221	.48377	.51623
1	24.9035	.87162	.12838	54	13.4734	.47157	.52843
2	24.8920	.87122	.12878	55	13.1218	.45926	.54074
3	24.8246	.86886	.13114	56	12.7679	.44688	.55312
4	24.7378	.86582	.13418	57	12.4120	.43442	.56558
5	24.6392	.86237	.13763	58	12.0546	.42191	.57809
6	24.5326	.85864	.14136	59	11.6960	.40936	.59064
7	24.4188	.85466	.14534	60	11.3369	.39679	.60321
8	24.2982	.85044	.14956	61	10.9776	.38422	.61578
9	24.1713	.84600	.15400	62	10.6186	.37165	.62835
10	24.0387	.84135	.15865	63	10.2604	.35911	.64089
11	23.9008	.83653	.16347	64	9.9036	.34663	.65337
12	23.7600	.83160	.16840	65	9.5486	.33420	.66580
13	23.6161	.82656	.17344	66	9.1960	.32186	.67814
14	23.4693	.82143	.17857	67	8.8464	.30962	.69038
15	23.3194	.81618	.18382	68	8.5001	.29750	.70250
16	23.1665	.81083	.18917	69	8.1578	.28552	.71448
17	23.0103	.80536	.19464	70	7.8200	.27370	.72630
18	22.8511	.79979	.20021	71	7.4871	.26205	.73795
19	22.6870	.79404	.20596	72	7.1597	.25059	.74941
20	22.5179	.78813	.21187	73	6.8382	.23934	.76066
21	22.3438	.78203	.21797	74	6.5231	.22831	.77169
22	22.1646	.77576	.22424	75	6.2148	.21752	.78248
23	21.9801	.76930	.23070	76	5.9137	.20698	.79302
24	21.7902	.76266	.23734	77	5.6201	.19670	.80330
25	21.5950	.75582	.24418	78	5.3345	.18671	.81329
26	21.3942	.74880	.25120	79	5.0572	.17700	.82300
27	21.1878	.74157	.25843	80	4.7884	.16759	.83241
28	20.9759	.73416	.26584	81	4.5283	.15819	.84151
29	20.7581	.72653	.27347	82	4.2771	.14970	.85030
30	20.5345	.71871	.28129	83	4.0351	.14123	.85877
31	20.3052	.71068	.28932	84	3.8023	.13308	.86692
32	20.0699	.70245	.29755	85	3.5789	.12526	.87474
33	19.8288	.69401	.30599	86	3.3648	.11777	.88223
34	19.5816	.68536	.31464	87	3.1601	.11060	.88940
35	19.3285	.67650	.32350	88	2.9648	.10377	.89623
36	19.0695	.66743	.33257	89	2.7788	.09726	.90274
37	18.8044	.65815	.34185	90	2.6019	.09107	.90893
38	18.5334	.64867	.35133	91	2.4342	.08520	.91480
39	18.2566	.63898	.36102	92	2.2754	.07964	.92036
40	17.9738	.62908	.37092	93	2.1254	.07439	.92561
41	17.6853	.61899	.38101	94	1.9839	.06944	.93056
42	17.3911	.60869	.39131	95	1.8507	.06477	.93523
43	17.0913	.59820	.40180	96	1.7256	.06040	.93960
44	16.7860	.58751	.41249	97	1.6082	.05629	.94371
45	16.4754	.57664	.42336	98	1.4982	.05244	.94756
46	16.1596	.56559	.43441	99	1.3949	.04882	.95118
47	15.8388	.55436	.44564	100	1.2973	.04541	.95459
48	15.5133	.54297	.45703	101	1.2033	.04212	.95788
49	15.1831	.53141	.46859	102	1.1078	.03877	.96123
50	14.8486	.51970	.48030	103	.9973	.03491	.96509
51	14.5101	.50785	.49215	104	.8318	.02911	.97089
52	14.1678	.49587	.50413	105	.4831	.01691	.98309

Kept to date by U.S. Code Congressional and Administrative News Pamphlets.

TABLE II

Table showing the present worth at 3½ percent of an annuity for a term certain, of an income interest for a term certain, and of a remainder interest postponed for a term certain.

(1) Number of years	(2) Annuity	(3) Term certain	(4) Remainder	(1) Number of years	(2) Annuity	(3) Term certain	(4) Remainder
1	0.9662	0.033816	0.966184	16	12.0941	.423294	.576706
2	1.8997	.066489	.933511	17	12.6513	.442796	.557204
3	2.8016	.098057	.901943	18	13.1897	.461639	.538361
4	3.6731	.128558	.871442	19	13.7098	.479844	.520156
5	4.5151	.158027	.841973	20	14.2124	.497434	.502566
6	5.3286	.186499	.813501	21	14.6980	.514429	.485571
7	6.1145	.214009	.785991	22	15.1671	.530849	.469151
8	6.8740	.240588	.759412	23	15.6204	.546714	.453286
9	7.6077	.266269	.733731	24	16.0584	.562043	.437957
10	8.3166	.291081	.708919	25	16.4815	.576853	.423147
11	9.0016	.315054	.684946	26	16.8904	.591162	.408838
12	9.6633	.338217	.661783	27	17.2854	.604988	.395012
13	10.3027	.360596	.639404	28	17.6670	.618340	.381654
14	10.9205	.382218	.617782	29	18.0358	.631252	.368748
15	11.5174	.403109	.596891	30	18.3920	.643722	.356278

A survey of the table of contents of the booklet discloses that the tables are intended to cover a wide variety of remainders, life estates, and reversions. The problems are raised by way of examples, many of which involve contingencies, and a solution for each example is included.

In addition, the introductory paragraphs of the booklet provide for obtaining valuation factors from the Commissioner in those cases where a factor cannot be computed from the tables. The Commissioner will not, however, compute factors to satisfy hypothetical questions; it is mandatory that the facts submitted relate to an actual decedent or a completed gift.

3. Interests Not Subject to Actuarial Valuation

As previously suggested, a common device for avoiding use of the tables and related regulations is an argument that the particular property interest in question is beyond the scope of actuarial valuation techniques. Mertens ably defines the issue: "The variety and complexities of a transferor's desire to cover all conceivable or desirable future contingencies have outstripped the statutory provisions, the regulations, and indeed the actuarial art itself and makes a precise and controlling statement of such limits [for employment of actuarial techniques] impossible."[23]

A 1961 revenue ruling holds that a remainder interest which will vest only upon the death without issue of a married woman aged 44 who has never had children is not susceptible to valuation under the actuarial rules.[24] This ruling cites the Supreme Court's *Commissioner v. Sternberger*[25] decision which had denied an estate tax charitable contribution deduction for the actuarial value of a remainder interest which could vest only if the decedent's 27-year old daughter failed to remarry and have children. The court with a degree of skepticism had noted that the actuarial computations omitted adjustments to reflect the fact that the daughter had a two million dollar inducement to remarry and have children.

The revenue ruling continues in its comments on the *Sternberger* case to draw some conclusions which are important to this section of this paper as well as in the subsequent section on charitable contributions. The ruling concludes that "merely because an interest in property cannot be evaluated with sufficient accuracy to support a deduction, it does not necessarily follow that the interest is without value."[26]

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[23] J. MERTENS, FEDERAL GIFT AND ESTATE TAXATION § 7.10 (1959).

[24] Rev. Rul. 88, 1961-1 CUM. BULL. 417.

[25] 348 U.S. 187 (1955).

[26] Rev. Rul. 88, 1961-1 CUM. BULL. 417-18.

The ruling makes it clear that the interest could be valued for purposes of gross estate inclusion under the general fair market value rules of § 20.2031-1 even though the actuarial rules of § 20.2031-7 cannot be applied. This means that a property interest could be attributed with basis in an income tax transaction to the extent which it had been included in a gross estate, even though it was not subject to actuarial valuation.

A more recent federal district court decision[27] illustrates some of the complexities of fact which produce problems in actuarial valuation, although in this instance the court was not required to determine whether or not actuarial rules would be applied. The case involved valuation of a vested reversionary interest subject to being divested by exercise of a power of appointment. The donor of the testamentary power (conceded to be a special power) had made no provision for disposition of the remainder of the trust property in event his donee-daughter failed to exercise the power in her will. This omission by the donor had, of course, created the reversion in his estate.

The daughter did exercise the power in her will, but the Internal Revenue Service attempted to include the value of the entire trust assets in the daughter's taxable estate, contending that the reversion inherited by the daughter had merged with her life estate and with her power to appoint by will, giving her an absolute interest in the trust property. However, the government contention was denied. The restrictions imposed on the power made it clear that the donor had never intended that an absolute interest vest in the daughter. The court recognized that the fair market value of the reversion was subject to inclusion in the daughter's taxable estate but found that the interest had no market value due to the daughter's inability to convey the interest without entering a contract promising not to exercise the power, a promise which would have frustrated her father's testamentary intent.[28]

The Internal Revenue Service has acknowledged that actual life expectancy can be substituted for actuarial table expectancies in cases where "it is known on the valuation date that a life tenant is afflicted with a fatal and incurable disease in its advanced stages, and that he cannot survive for more than a brief period of time ...."[29] This follows the rule expressed by the Tax Court in the

[27] Maryland Nat'l Bank v. United States, 236 F. Supp. 532 (D. Md. 1964).

[28] *Id.* at 536.

[29] Rev. Rul. 307, 1966-2 CUM. BULL. 429.

Estate of Nellie H. Jennings[30] which involved valuation of a remainder estate being bequeathed to charity after a life estate in the decedent's invalid husband had terminated. The court stated the proposition "that the use of established mortality tables, which are evidentiary only, must give way to the proven facts which show a less life expectancy."[31]

The *Jennings* decision also quotes the Supreme Court's decision in *United States v. Provident Trust Co.*[32] to the effect that values "must be determined from data available at the time of death of decedent."[33] The *Provident Trust* decision and the Supreme Court's preceding holding in *Ithaca Trust Co. v. United States*[34] also establish the principle that hindsight is not relevant. The actual death of the life tenant prior to the filing of the estate tax return will not preclude application of actuarial tables to establish the life tenant's life expectancy as of the estate tax valuation date.

A more recent Tax Court memorandum opinion considers a contingent remainder which the remainderman had conveyed by gift in order to be sure that it would not be included in his taxable estate.[35] The life tenant died prematurely within two months after the gift, and this was a case where the Commissioner desired to substitute the actual life as determined for the expectancy to be produced by his own mortality table. The gift tax deficiency imposed by the Commissioner as a result of substituting actual life in the valuation factor was almost a million dollars.

The Tax Court recognized the rules of the above cited cases and held, in addition, that to avoid use of the tables, the life span as of the date of transfer must be ascertainable with exactitude.[36] The Commissioner was held to the use of the tables in this case where it had not been shown that the life tenant's date of death was predictable at the time of the gift.[37]

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[30] 10 T.C. 323 (1948). The court held:

> The evidence is that at the date of decedent's death the life expectancy of her husband was not more than one year. [Such evidence being derived from husband's physical condition, not established mortality tables.] Actually, he lived only two months. We therefore sustain petitioner's contention that the valuation of the life estate, which must be deducted from charitable bequests, should be based upon a life expectancy of not more than one year.

Id. at 328.

[31] *Id.* at 327.

[32] 291 U.S. 272 (1934).

[33] *Id.* at 281.

[34] 279 U.S. 151 (1929).

[35] Chauncey Stilman v. Comm'r., 24 CCH TAX CT. MEM. (1965).

[36] *Id.* at 496.

[37] *Id.* at 503.

4. Validity of the Tables

In some instances, those desiring to challenge applicability of the tables have looked to the structure of the tables themselves rather than to the nature of the property interest to be valuated. The present actuarial tables utilize a 3½ percent discount rate compounded annually and the "Makehamized" mortality table which appears as Table 38 of *United States Life Tables and Actuarial Tables 1939-1941*, published by the Bureau of Census.[38]

Tables in use before January 1, 1952 used mortality factors based on the experience of 17 British insurance companies between the years 1762 and 1837.[39] Needless to say, the use of these life expectancies gave cause for concern, but their obsolescence probably worked to the tax advantage of the concerned parties as often as to their disadvantage. One may speculate that this was one reason why the use of the tables had not been successfully challenged on this infirmity.

There have been many serious and more recent questions raised as to the appropriateness of the interest rate. As noted above, the current Internal Revenue Service tables were compiled using a 3½ percent factor,[40] although tables in use before 1952 use 4 percent.[41] The Tax Court has taken its stand with reference to deviations from the rates: "To avoid introducing unnecessary complexity and confusion into this broad and active field, we take the view that the method prescribed in the regulations is to be followed unless the facts present a substantial reason for departure therefrom."[42] This court went on to find an actual yield of 4.34 percent on the single common stock held in trust and held there was not "sufficient basis" for deviating from the 4 percent discount rate which was at that time incorporated in the Commissioner's tables.[43]

Other cases have permitted alternative rates of return to be substituted for those in the tables.[44] The Court of Claims in *Hanley v. United States*[45] found that a 3.09 percent return was sub-

[38] U.S. DEPT. OF COMMERCE, UNITED STATES LIFE AND ACTUARIAL TABLES, 1939-41 (1946). Since these tables are not currently in use they are not included for reference.

[39] Koshland v. Comm'r, 177 F.2d 851 (9th Cir. 1949).

[40] *See* table, *supra* note 22.

[41] *Supra* note 32.

[42] Estate of Irma E. Green, 22 T.C. 728, 732 (1954). *See also,* McMurtry v. Comm'r, 203 F.2d 659 (1st Cir. 1953) where the court held that although "valuing individual life interests by resort to mortality tables may be educated guesswork," the discrepancies will average out in the long run. *Id.* at 666-67.

[43] Estate of Irma E. Green, 22 T.C. 728, 733 (1954).

[44] Hanley v. United States, 63 F. Supp. 73 (Ct. Cl. 1945); Huntington Nat'l Bank, 13 T.C. 760 (1949).

[45] 63 F. Supp. 73 (Ct. Cl. 1745).

stantially at variance with the 4 percent tables,[46] and a later Tax Court decision permitted use of a 3½ percent actual yield in lieu of the 4 percent tables.[47]

A very recent Fourth Circuit decision, *Rosen v. Commissioner*,[48] permitted a taxpayer to use the tables in valuation, for gift tax exclusion purposes, of an income interest in closely held corporate stocks despite the Commissioner's protests that the stock had neither paid nor could be expected to pay a dividend. The court said that "[r]esort to the tables is justified in cases where valuation necessarily presents an element of speculation and where use of the tables is actuarially sound."[49] The court did note that the trustees had power to sell the donated shares and invest the proceeds in income producing property.

As in cases involving actual life expectancies, it appears that the Commissioner may have been less successful in deviating from his actuarial tables than the taxpayers. In *Rosen*, the court recognized that "[n]eutral principles forbid that the Commissioner be allowed to apply the tables where to do so produces greater revenue and to refuse application where it does not."[50]

An earlier district court decision[51] had denied the Commissioner his presumption of correctness when it had been shown that the method substituted by the Commissioner for the actuarial tables was erroneous. The court summarized the justification for broad application of the tables:

> The valuation of future interest is at best a highly speculative undertaking not unlike the determination of life expectancy which courts and juries are called upon to make in almost all personal injury actions. Recognizing that the value of future interest cannot be determined with any degree of certainty, those called upon to make valuations have resorted to established computations which seldom accurately predict the value in a particular situation but prove to be accurate when used in a great number of instances.[52]

With reference to the substitution of actual known rates of return, it must be noted that the regulations provide separately and specifically for valuation of all interests in commercial annuity contracts and insurance contracts.[53] Surely a vast majority of the

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[46] *Id.* The court stated further: "The Commissioner recognizes that when the facts indicate the use of a rate other than 4% he will use such rate." *Id.* at 77.

[47] Huntington Nat'l Bank, 13 T.C. 760 (1949).

[48] 397 F.2d 245 (4th Cir. 1968).

[49] *Id.* at 247.

[50] *Id.* at 248.

[51] Hipp v. United States, 215 F. Supp. 222 (W.D.S.C. 1962).

[52] *Id.* at 226.

[53] Treas. Reg. § 20.2031-8 (1958).

contracts in which the rate of return is fixed in advance will fall into these classifications.

C. *Allocation of Basis*

The regulations provide that:

> When a part of a larger property is sold, the cost or other basis of the entire property shall be equitably apportioned among the several parts, and the gain realized or loss sustained on the part of the entire property sold is the difference between the selling price and the cost or other basis allocated to such part.[54]

Other income tax regulations describe in detail the mechanics involved in measuring the gain on a "[s]ale or other disposition of a life interest, remainder interest, or other interest in property acquired from a decendent."[55] There are, however, no corresponding instructions to cover dispositions of property not acquired by bequest or inheritance. The actuarial method prescribed by regulation for property acquired from a decendent has been accepted by the courts when applied to property acquired by deed,[56] but in 1965 the Tax Court acknowledged that "[n]either the Code nor the regulations prescribe a method for allocating a lump-sum basis when the owner of a fee simple interest conveys, inter vivos, a less-than-fee estate."[57]

This case involved the sale of ranch lands located within Grand Teton National Park to the National Park Service with a life estate retained by the sellers. The court permitted the Commissioner to apportion basis using a ratio formed with the actual amount paid by the government for the remainder interest over the appraised value of the fee simple. The court recognized the above cited regulation and the *Camden v. Commissioner*[58] decision but concluded that these imposed no requirement that the actuarial tables be used. The Commissioner's method was found to be both logical and reasonable.

It must be noted, however, that the court was not informed as to what method of attributing value between respective interests had been used by the National Park Service in arriving at the price to be offered for the remainders. If the actual price paid had been determined with reference to the life expectancies of the seller, the Commissioner's pro-rations had in effect duplicated the actuarial method prescribed in the regulation which the court purported to

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[54] *Id.* at § 1.61-6(a) (1957).

[55] *Id.* at § 1.1014-5(a) (1957).

[56] Estate of Johnson N. Camden, 47 B.T.A. 926 (1952) *aff'd*, Camden v. Commissioner, 139 F.2d 697 (6th Cir. 1943).

[57] Eileen M. Hunter, 44 T.C. 109, 115 (1965).

[58] 139 F.2d 697 (6th Cir. 1943).

ignore. Of course the discount rate selected to determine the actual price, if different than that used in the Commissioner's tables, could cause a difference in amounts.

It is clear in the decision that the court would have considered the actuarial method appropriate. Part of its readiness to accept the alternative method arose from impatience with the petitioner-taxpayers who had concentrated on allegations of "arrogant usurpation of authority by incompetent and ruthless employees of the Government."[59] The judge regretted the petitioners' failure to rely to a greater extent on substantive tax law.

Certainly the regulation governing apportionment of the basis of property acquired from a decedent must be recognized as an appropriate guide in apportioning basis whenever there is a conveyance of a life estate or remainder interest, whatever its source; but, because so many such interests originate in wills, the regulation is of pervasive importance in taxation of future interest transactions.

D. *Uniform Basis*

Section 4 of Regulation 1.1014 introduces a concept known as the principle of uniform basis. In the words of this regulation, the basis of the property "will be the same, or uniform, whether the property is possessed or enjoyed by the executor or administrator, the heir, the legatee or devisee, or the trustee or beneficiary of a trust created by will or an inter vivos trust."[60]

Section 5 provides for allocation of basis upon disposition of one of multiple interests in property.[61] The regulation, for this purpose, incorporates by reference the same actuarial tables previously considered in connection with estate tax valuations. Also repeated is the offer of factors to be furnished by the Internal Revenue Service in actual situations which do not conform to the tables.

The text of the regulation provides that: "[I]n ascertaining the basis of a life interest, remainder interest, or other interest which is sold or otherwise disposed of, the uniform basis rule contemplates that proper adjustments will be made to reflect the change in relative value of the interests on account of the passage of time."[62]

In other words, the total basis as established by estate tax valuation does not change, but apportionment of this total basis among fractional interests is dependent upon actuarial factors which are applied at the time the fractional interest is sold. This means

[59] *Id.* at 112.

[60] Treas. Reg. § 1.1014-4 (1957).

[61] *Id.* at § 1.1014-5 (1957).

[62] *Id.*

that the tax basis of a fractional interest fluctuates as the life expectancies of the interested parties diminish. The result is a situation seemingly without parallel in income tax procedures. The basis of an individual property owner's interest is permitted to change with the passage of time even though no basis adjustments are being reflected in the computations of periodic taxable income. There is, of course, an offsetting change to the tax basis of some other owner of a related property interest.

The principle of uniform basis has been developed to deal with problems involving the amount of basis in a fractional interest in property, but related rules are designed to establish a certain uniformity in methods for establishing the time of acquisition for tax purposes of property acquired from a decedent. The time factor is critical to many income tax determinations.

Prior to the Supreme Court's *Helvering v. Reynolds*[63] decision in 1941 there had been conflict as to whether contingent remainders would take their basis from the fair market value at the date of the testator's death or from their fair market value when they became finally vested. Justice Douglas, in *Reynolds,* noted that "to carry into that [basis] computation the value of property at the time the taxpayer had only a contingent remainder interest in it is not to tax him on values which he never received."[64] Presently, the income tax basis rules do not distinguish between vested and contingent remainders.

The *Reynolds* decision reaffirms an exception to the uniform basis rules which had been established in an earlier Supreme Court decision, *Maguire v. Commissioner.*[65] When a remainderman of a testamentary trust receives property which was purchased by the trustee and not included in the property distributed from the settlor's estate, the remainderman's basis is the same as the trustee's basis.

The propriety of this exception is clear when one considers that the trustee must file income tax returns and recognize the taxable transactions which would arise when the property acquired by the trust from the decedent was converted to other property. By the same reasoning, the uniform basis rule does not preclude the *Code* § 1016 adjustments to basis for depreciation, depletion, and capital improvements.[66]

Early Board of Tax Appeal decisions compelled a remainderman to reduce his basis by the actuarial value of a life estate or estate

[63] 313 U.S. 428 (1941).

[64] *Id.* at 434.

[65] 313 U.S. 1 (1941). The Court held: "As respects the property which was purchased by the trustees, we are of the view that its cost to them, rather than its value at the date of delivery to the taxpayer, governs." *Id.* at 8-9.

[66] Treas. Reg. § 1.1014-4 (1957).

for a term of years which had already expired.[67] This rule, of course, cannot be reconciled with the uniform basis doctrine or with the principles applied in the *Maguire* and *Reynolds* decisions. The concept of shifting basis, long incorporated in the regulations, dictates that as the intervening estate approaches its termination, the basis shifts to the remainder; and when the remainderman takes title to the property, he acquires also the total original tax basis as determined by the estate tax valuation.

The conflict was resolved in 1937 when the board acknowledged that its position had been erroneous.[68] The remainderman, who had already come into possession of the property, was permitted in this case to deduct as basis the entire original estate tax value upon sale of the property.

II. Charitable Contributions

A. *Principles*

As noted in the paragraphs introducing this work, mechanical methods for measuring the amount of a tax deduction for a contribution to charity of a future interest are similar to those applied in the determination of tax basis. The charitable contributions regulations[69] rely upon the same tables, those provided in *Internal Revenue Service Publication No. 11* entitled *Actuarial Values for Estate and Gift Tax.*[70]

Undoubtedly, the procedures for valuation of future interests find their most frequent exercise in the areas of charitable contributions. Contributions to charity of remainder interests with a beneficial life estate reserved to the donor are a popular tax saving device, and an effective method by which the property owner can with certainty designate his charitable beneficiaries while retaining unrestricted use of the property during his lifetime.

"If a contribution is made in property other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution."[71] This excerpt from the regulation established an exception to the general rule in tax

[67] William Huggett, 24 B.T.A. 669 (1931); *rev'd*, Huggett v. Burnet, 64 F.2d 705 (D.C. Cir. 1933); *but see*, Elizabeth S. Vale, 30 B.T.A. 1351 (1934).

[68] William H. Slack, Jr., 36 B.T.A. 105 (1937). The court said:

> In the case of *Elizabeth S. Vale*, 30 B.T.A. 1351, the Board adhered to the opinion it had adopted in the case of *William Huggett, supra*, rejecting the conclusion reached by the Court of Appeals in *Huggett v. Burnet, supra.* The Board is now convinced that its position in the *Vale* case was erroneous and that case will not be followed in the future.

Id. at 109.

[69] Treas. Reg. § 1.170-2(d)(2) (1958).

[70] IRS Publication No. 11, Rev. 5-59.

[71] Treas. Reg. § 1.170-1(c) (1958).

law that a deduction must always be limited to the taxpayer's basis in the property given up. Such an exception is difficult to rationalize within the framework of traditional income measurement principles and would seem to originate simply from a governmental policy of encouraging charitable donations.

Clearly future interests qualify as property other than money. The regulation provides that "[a] deduction may be allowed for a contribution of an interest in the income from property or an interest in the remainder . . . ."[72]

B. *To Irrevocably and Unconditionally Vest in Charity*

The regulation paragraph following that cited above, however, imposes a general limitation with broad effects:

> If as of the date of a gift a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible.[73]

The courts have narrowly confined income tax deductions to those meeting a test of strict unconditional vesting,[74] although estate tax deductions have been permitted where "there is virtually no possibility that anyone other than the charity will take the property."[75]

The *Code* provides specific guidelines for gifts to trusts involving reversions:

> No deduction shall be allowed under this section for the value of any interest in property transferred after March 9, 1954, to a trust if —
>
> (i) the grantor has a reversionary interest in the corpus or income of that portion of the trust with respect to which a deduction would (but for this subparagraph) be allowable under this section; and
>
> (ii) at the time of the transfer the value of such reversionary interest exceeds 5 percent of the value of the property constituting such portion of the trust.[76]

The regulation defines the term "reversionary interest" as:

> [A] possibility that after the possession or enjoyment of property or its income has been obtained by a charitable donee, the property or its income may revest in the grantor or his estate, or may be subject to a power exercisable by the grantor or a non-adverse party (within the meaning of section 672(b)), or both, to revest in, or return to

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[72] *Id.* at § 1.170-1(d) (1958).

[73] *Id.* at § 1.170-1(e) (1958).

[74] *See,* Schoellkopf v. United States, 124 F.2d 982 (2d Cir. 1942).

[75] Polster v. Commissioner, 274 F.2d 358, 365 (4th Cir. 1960).

[76] INT. REV. CODE of 1954, § 170(b)(1)(D).

or for the benefit of, the grantor or his estate the property or income therefrom.[77]

The subsequent paragraph of the regulation providing instructions for valuation of reversions and remainder interests refers to the by now familiar estate tax actuarial tables.[78]

C. *Severance of the Charitable Interest*

The doctrine that the charitable interest must be severable from its related noncharitable interests is dictated by logic; for without such a rule, there is no acceptable formula for ascertaining the value of the interest to be deducted.[79]

A practical illustration of inability to sever is provided by a gift to charity of a remainder interest in a trust in which the trustee has power to invest in mutual funds and allocate capital gains to income. A purchaser of mutual fund shares acquires rights in the unrealized appreciation in securities held by the fund at the time of his purchase. This appreciation will ultimately be realized and distributed by the fund to its shareholders in the form of capital gain dividends. An income beneficiary who is permitted to receive these distributions will be eroding the trust corpus which was designated for charity, and there is no means of determining in advance the rate at which this erosion will occur. There is, therefore, no method to ascertain the deductible value of the charitable interest.

Comparable problems arise whenever the trustee is granted broad discretion in the selection of investments and the determination of distributable trust income. A 1965 Tax Court decision, *James v. Darling*,[80] involves fractional remainder interests in numerous Denver real properties. In disallowing deductions for charitable contributions of the remainders, the court explicity declined to address the issue as to whether or not "failure to provide for a depreciation reserve in the trust renders the gifts of future interests in depreciable properties unassured and unascertainable in amount."[81]

Instead, the decision relied upon the fact that the powers reserved to the trustee for the benefit of the life tenants were entirely too broad to permit assurance that a gift of ascertainable value had been conveyed to the charity.[82] This case, which involved

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[77] Treas. Reg. § 1.170-2(d)(1) (1958).

[78] *Id.* § 1.170-2(d)(2).

[79] Rev. Rul. 33, 1967-1 CUM. BULL. 62, which states in part: "If there are noncharitable income beneficiaries, a charitable remainder interest in corpus which is subject to such power of investment, and diversion, cannot be severed from the noncharitable income interest in the absence of an acceptable formula for ascertaining the value of the remainder interest." *Id.* at 63.

[80] 43 T.C. 520 (1965).

[81] *Id.* at 538.

[82] *Id.*

a reservation by the donors of powers to control disposition of the properties and reinvestment of the proceeds, includes a comprehensive review of the prior cases involving the ability to sever.

A similar result occurred in the case of *Jones v. United States*[83] involving an assignment of an endowment policy to charity. Deduction of the present value of installment payments on matured endowment policies was disallowed because assignment of the installments was conditioned by a provision that any installments due after the death of the donor were to be paid to designated survivors. The court denied deduction of the present values despite the fact that the computations reflected the actuarial probability of the donor being survived by the designated beneficiary.[84]

In a later tax court case[85] the facts were distinguished from those in the *Darling* and *Jones* decisions cited above, and the deduction was allowed for contributions to a trust even though the husband and wife donors were also the trustees with broad powers to manage, sell, and reinvest the trust corpus. The court found it "highly improbable that the petitioners in their fiduciary capacity will ever perform an act which will defeat the charitable remainders they have created in the trust."[86] Important considerations were the donor's will by which his residuary estate "poured over" into the charitable trust, the meticulous records by which the donor segregated the trust assets from his own, and his preesstablished favor for the charitable remaindermen.

This trust instrument also provided that the contributions could be recaptured by the donors if the Commissioner of Internal Revenue did not allow an income tax deduction, but the court denied that the Commissioner's administrative disallowance of the contribution deduction had triggered recapture. Instead, it was decided that possibility of recapture could not be determined without knowledge of the final outcome of the litigation being decided.

The Commissioner has ruled, however, that no deduction would be allowed for contributions to a trust with a savings provision calling for revocation of the trustee's powers to whatever extent necessary to make the charitable remainder inovlved a severable and ascertainable interest deductible for federal tax purposes.[87]

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[83] 252 F. Supp. 256 (N.D. Ohio 1966).

[84] *Id.* at 267. The court said:

> At the time of the assignments there existed a probability, variously estimated by the parties to be either 6.8% or 11.1%, that the Miniger Foundation would receive nothing as the result of these assignments, or that, having taken something, it would receive nothing further, and that these chances of not so taking were not so remote as to be negligible.

[85] *Id.* William D. O'Brien, 46 T.C. 583 (1966).

[86] *Id.* at 596.

[87] Rev. Rul. 1944, 1965-1 CUM. BULL. 442.

This ruling considers such savings provisions contrary to public policy and void. Therefore, the powers rendering the charitable remainder nonseverable and not subject to ascertainment remain effective.

The public policy considerations are found in the frustrating effects of the described provisions on tax enforcement efforts and in concern that no valid case or controversy would be presented to a court deciding upon the the severance issue. All determinations, at any level, in favor of the Internal Revenue Service would simply defeat the gift.

There is another area in which the donor of a potentially deductible charitable contribution of a future interest must exercise caution. An income interest in stocks of a corporation controlled by the donor or certain of his relatives may be found nonseverable because the donor, through his stockholder voting powers to control dividend distributions by the corporation, has effectively retained a discretionary power to control distributions to the income beneficiary.[88]

D. *Tangible Personal Property*

Before 1964 there existed a popular practice of donating tangible personal property, most commonly art objects or rare books, to a charitable institution with a life estate reserved to the donor. This provided the donor with an income tax deduction for the fair market value of the remainder irrespective of the amount of his investment or basis in the object.

Establishing the market value of rare objects almost inevitably involved the subjective determinations of a specialized appraiser whose opinions were difficult to challenge and practically impossible to disprove. Often the donee, a museum, library, or university, offered the most authoritative source of expert appraisal advice; but certainly the institution, being anxious to retain the favors of its benefactors, could not be expected to provide completely impartial services when only the taxing authorities stood to lose by its bias.

The result was generous income tax deductions for illusory contributions, as the deduction could far exceed the total cost of the object to the donor who was not even required to give up possession.

Congress reacted in the *Revenue Act of 1964* with the addition of *Code* Section 170(f) which says in part that:

> [P]ayment of a charitable contribution which consists of a future interest in tangible personal property shall be treated as made only

[88] Elise McK. Morgan, 42 T.C. 1080 (1964); *aff'd* per curiam Morgan v. Commissioner, 353 F.2d 209 (4th Cir. 1965).

> when all intervening interests in, and rights to the actual possession or enjoyment of, the property have expired or are held by persons other than the taxpayer [or certain relatives] . . . .[89]

In the typical case, of course, delaying the deduction until the gift is completed means that only the estate tax will be affected by the transaction.

CONCLUSION

Recent newspaper and magazine issues have dedicated extensive space to the "taxpayer revolt" and to exposure of the myriad "tax shelters" and "loopholes" in the federal income tax law. The press has delighted in exploring the ingenious devices employed by those millionaires who pay no income taxes. Only rarely, however, do the popular media touch upon the vast area of tax intricacies which this paper attempts to introduce.

But if future interests have been ignored by the press, they have not been ignored in practice. Perhaps the inability of future interest devices to arouse public outrage is a major advantage which accrues from their use.

Only the most sophisticated tax practitioners are equipped to totally avail their clients of these plans. The public apathy may stem from ignorance; or, it may be that the typical future interest transactions are so imbued with benevolent motives that the public willingly overlooks the donor's tax advantages. The fact that the taxpayer's death is frequently a prerequisite to his final reward of tax savings could be another reason for the relative lack of public concern.

This paper has to a degree deemphasized the factual distinctions upon which the cases are often decided. The facts seem significant in these cases primarily with regard to determination of the taxpayer's intent. The courts seem inclined to construe the statutes and regulations more liberally in favor of the taxpayer who can show by the facts that his plan was motivated by benevolent considerations which raise it above the status of a mere tax "gimmick."

Hopefully, the reader has become aware of the future interest devices being used in tax law practice. A reader who could conceive new applications in the areas of either income tax or estate and gift tax plans would be welcomed with enthusiasm by the fraternity of tax free millionaires.

Of more importance, though, is the prospect that the tax laws in this area may be providing a framework which promotes the fi-

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[89] INT. REV. CODE of 1954, § 170(f).

nancial support of institutions recognized as beneficial by public welfare standards.

James Gehres

COMMENTS

TAXES — CORPORATE TAXATION — CLASSIFICATION OF PROFESSIONAL SERVICE CORPORATIONS FOR INCOME TAX PURPOSES.* — *Empey v. United States,* 272 F. Supp. 851 (D. Colo. 1967), *aff'd,* 406 F.2d 157 (10th Cir. 1969).

A GROUP of Colorado lawyers formed a professional service corporation pursuant to a rule promulgated by the Colorado Supreme Court.[1] Plaintiff Empey, a stockholder in this corporation, applied for a tax refund allegedly due him. When the Internal Revenue Service failed to take affirmative action on the refund application, Empey brought suit in federal district court.[2] The government argued that the organization to which Empey belonged was not a corporation for federal income tax purposes. The Tenth Circuit Court of Appeals affirmed the trial court's determination that this was a corporation for federal tax purposes and the regulation saying that it wasn't, was contrary to the *Internal Revenue Code,* previous case law, and previous regulations.

As a result of the decision in *Empey,* professional corporations and associations have gained a stronger foothold for survival and have become an important consideration in tax planning for professional service people. These professional associations had traveled an uncertain path; the developments up to *Empey* have formed into a somewhat comical story of the battle between the Treasury and the professional service taxpayer. The development and future of the tax treatment problem for professional service taxpayers are the subjects of this article.

The conflict on how to treat an organization for tax purposes appeared in 1935 when the United States Supreme Court held in *Morrissey v. Commissioner*[3] that a trust set up to run a business resembled an association enough to be treated for tax purposes like a corporation. Thus, if an organization's characteristics resembled

* The Treasury officially abandoned its long opposition to corporate tax treatment for professional service corporations in August 1969. Technical Information Release No. 1019 Aug. 8, 1969. The Release allows corporate tax treatment for those persons incorporating under state laws professional service corporations. Currently, only four states do *not* allow such corporations: Iowa, Nebraska, New York, and Wyoming. 56 TAXES ON PARADE No. 35, part 1, at 4, July 30, 1969.

[1] On December 5, 1961, at the request of the Colorado Bar Association, the Colorado Supreme Court promulgated rule No. 231, now rule 265 *Colo. R. Civ. P.*

[2] Empey v. United States, 272 F. Supp. 851 (D. Colo. 1967), *aff'd,* 406 F.2d 157 (10th Cir. 1969).

[3] 296 U.S. 344 (1935).

substantially those of a corporation, it would be classified as an "association," associations being taxed as though they are in fact corporations. The Court posed four questions in *Morrissey,* the answers to which should be used to determine whether or not an organization should be treated as an association for tax purposes: (1) whether or not an organization has a centralized management; (2) whether or not there is a continuity of enterprise; (3) whether or not there is a means of transferability of interests without ending continuity; and (4) whether or not limited liability exists. The Court, however, did not limit the test to these four attributes. It thought inquiry should be made as to who held title to the property — was title held by an entity separate from the principals of the organization?[4] In a close case, the Court seemed to think that an important factor to consider would be how the organization represented itself to the public.[5]

In 1936 the Commissioner of Internal Revenue argued in *Pelton v. Commissioner*[6] that a clinic formed by a group of Illinois physicians should be taxed as a corporation rather than as a partnership, even though physicians could not form a corporation under Illinois law. The court agreed with the argument that the clinic was carrying on business for a profit and had substantial similarities to a corporate organization sufficient to qualify the organization as a corporation for tax purposes. To determine whether or not it substantially resembled a corporation the court used the test set up in *Morrissey.*[7] The court also held that national uniformity required that the title a state gave to an organization was not conclusive, but that the court must examine actual form and characteristics in determining how the organization should be treated under federal tax law.[8]

Some professional service taxpayers, however, wanted the benefit of some of the tax advantages of the corporate form. Health, retirement, and death benefits were far greater, at lower tax rates, and the corporation was able to deduct payments into these funds or plans as a proper business expense. In response to these taxpayers, the government seemed to change its position. In *United States v. Kintner,*[9] it has argued that a group of Montana physicians should be taxed as a partnership and not as a corporation. However, the court found that although the physicians could not incorporate

[4] *Id.* at 345.
[5] *Id.* at 360.
[6] 82 F.2d 473 (7th Cir. 1936).
[7] *Id.* at 476.
[8] *Id. See also* Helvering v. Combs, 296 U.S. 365 (1935).
[9] 216 F.2d 418 (9th Cir. 1954).

under Montana law, their organization more closely resembled a corporation than any other type or form of organization. The organization was run by some rather than all of the former partners, it incurred debts in the name of the association, it paid federal and state corporate taxes, its members received their compensation from the association and not from individual clients and death or retirement of one or more members would not cause dissolution of the organization. The resemblance hence was substantially that of a corporation, even though the interest of a member was not assignable as is the normal corporate interest.

A few years later, in *Galt v. United States,*[10] a group of Texas physicians won corporate tax treatment even though they could not legally incorporate under Texas law. The court said:

> We think the association was entitled to be treated for tax purposes as though it was a corporation and the act of a state can neither raise nor lower the federal taxes that may be due by the association by whatever name it may be called under the laws of the particular state.[11]

On December 23, 1959, the Treasury announced newly proposed regulations to show its position on professional associations. In 1956, as expected, the Department had announced that it would not follow the *Kintner* decision.[12] However, in 1960 the Department adopted the strongly protested "Kintner Regulations."[13] Under the "Kintner Regulations" an organization had to have the following characteristics in order to qualify for corporate tax treatment: (1) associates; (2) the objective of carrying on business for profit with subsequent division of that profit; (3) continuity of life; (4) limited liability; (5) centralization of management; and (6) free transferability of ownership interests. The regulations go on to say that items (1) and (2) are of lesser importance because they are common to both corporations and partnerships and that to be treated as a corporation for tax purposes an organization must have more corporate characteristics than noncorporate characteristics.

These new regulations ignored previous case law which held that general partnerships could be taxed as corporations even though they were treated as general partnerships under local law[14] and

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[10] 175 F. Supp. 360 (N.D. Tex. 1959).

[11] *Id.* at 362.

[12] Rev. Rul. 56-23, 1956-1 CUM. BULL. 598.

[13] Treas. Reg. § 301.7701-2 (1960).

[14] Burke-Waggoner Oil Ass'n. v. Hopkins, 269 U.S. 110 (1925); United States v. Kintner, 216 F.2d 418 (9th Cir. 1954); Wabash Oil & Gas Ass'n. v. Commissioner, 160 F.2d 658 (1st Cir. 1947), *cert. denied,* 331 U.S. 843 (1947); Popular Bluff Printing Co. v. Commissioner, 149 F.2d 1016 (8th Cir. 1945); Bert v. Helvering, 92 F.2d 491 (D.C. Cir. 1937); Wholesalers Adjustment Co. v. Commissioner, 88 F.2d 156 (8th Cir. 1937); Cincinnati Stamping Co., 45,258 P-H Mem. T.C. (1945).

that local law did not control how an organization was treated for federal tax purposes.[15] The "Kintner Regulations" also seemed inconsistent or more strict than previous regulations which did not even mention limited liability or free transferability of ownership interests.[16] In fact, these regulations specifically state that a partnership lacks one of the essential requirements of a corporation:

> Accordingly, a general partnership subject to a statute corresponding to the Uniform Partnership Act and a limited partnership subject to a statute corresponding to the Uniform Limited Partnership Act both lack continuity of life.[17]

When it became apparent that to qualify for corporate tax treatment a general partnership must incorporate under state law, states sympathetic to professional taxpayers acted quickly. In 1961 and 1962 alone 18 states enacted laws to allow professional associations or corporations.[18]

While the Treasury and professional service taxpayers were battling, Congress was attempting to solve the root of the problem — tax inequality between self-employed individuals and corporate employees. The Keogh Bill, known as H.R. 10 or the Self-Employed Individuals Tax Retirement Act of 1962 was delayed time and again in the Senate Finance Committee before it was finally passed in 1962. The Treasury was strongly against the Keogh Bill in its original form and it was only with Treasury sponsored changes that the bill passed at all.[19]

Because of its amended form and the delay in its approval the Keogh Bill only partially bridged the gap in tax treatment between corporate and professional service taxpayers. Professional service taxpayers had their expectations raised during the debates and were severely disheartened by the result. One effect was an increased desire on their part to achieve corporate tax status, which led ultimately to an amendment to the Bill in 1966 which narrowed the gap, but did not close it completely.[20]

This amendment altered one of the features of the original act, that the self-employed could deduct only half of the amount

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[15] *See* Galt v. United States, 175 F. Supp. 360 (N.D. Tex. 1959).

[16] For an excellent discussion of the history of this problem, *see* Bye & Young, *Law Firm Incorporation in Colorado,* 34 ROCKY MT. L. REV. 427 (1962).

[17] Treas. Reg. § 301.7701-2(1)(3) (1960).

[18] *See* Bye & Young, *supra* note 16, at 434.

[19] For an interesting discussion on H.R. 10's problems and battles, *see* Rapp, *The Quest for Tax Equality for Private Pension Plans: A Short History of the Jenkins-Keogh Bill,* 14 TAX L. REV. 55 (1958). The new law was to take effect for taxable years after December 31, 1962.

[20] The amendment was by a rider on the Foreign Investors Tax Act of 1966. Act of November 13, 1966, Pub. L. No. 89-809, § 204, 80 Stat. 1577. It still gives an inferior treatment to professional service and other self-employed taxpayers when compared to corporate benefits. Incorporation should be given serious consideration by all professional service-self-employed taxpayers.

contributed to retirement and profit-sharing plans with a maximum of $1,250 being deductible.[21] The amendment provides that for those years beginning after December 31, 1967, the entire contribution for a self-employed person is deductible up to $2,500 or 10 percent of earned income, whichever is less.[22] Contributions for employees are deductible in full up to a standard limitation of 15 percent of their compensation. If both pension and profit sharing plans are in effect, then the standard limitation is 25 percent. The corporation has no limit to how much more it may want to contribute to the plans as long as the contribution is the *reasonable* actuarial cost of funding benefits. If the 15 percent limitation is not reached in any year the remaining contribution deduction may be carried forward indefinitely. However, an employer cannot deduct in any year more than 30 percent of participating employees' compensation.[23]

Distribution of the benefits of an H.R. 10 plan cannot be made to a self-employed person who is an owner-employee before he reaches the age of 59½ unless he is permanently disabled, but benefits must start before he reaches the age of 70½.[24] This limitation is applicable evn if the plan is terminated.[25] The only restriction on when benefits can be distributed to an employee, defined as one who is less than a 10 percent partner, is that payments must start before the age of 70½.[26] Thus, an employee may receive benefits if he retires, is disabilitated, dies, is discharged, or quits before he reaches the age of 70½. Total distribution of the benefits must be made within five years of death or can be used to buy an immediate annuity payable on the life of a beneficiary.[27]

H.R. 10 plans may be pension, profit sharing, or annuity plans and are in the forms of Trusteed plans,[28] Annuity plans,[29] Custodial Account plans,[30] U.S. Government Bond plan,[31] and Face-Amount Certificate plans.[32] H.R. 10 originally amended twenty sections of the *Internal Revenue Code* of 1954 relating to corporate retirement arrangements and provided one additional section,[33] which

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[21] INT. REV. CODE OF 1954, §§ 404(a)(10), 404(e)(1).
[22] *Id.* § 404(e)(1).
[23] *Id.* § 404(a)(3)(7).
[24] *Id.* § 401(d)(4)(B).
[25] Rev. Rul. 65-21, 1965-1 CUM. BULL. 174.
[26] INT. REV. CODE OF 1954, § 401(a)(9).
[27] *Id.* § 401(d)(7).
[28] *Id.* § 401(d)(1).
[29] *Id.* §§ 401(g), 403.
[30] *Id.* § 401(f).
[31] *Id.* § 405.
[32] *Id.* §§ 401(g), 403.
[33] *Id.* § 405.

described newly created bonds for investments for H.R. 10 plans. The key sections to H.R. 10 are the sections governing qualification[34] and deductions.[35] H.R. 10 plans are more restricted in types of investments that can be made than are corporate plans. The earnings from H.R. 10 funds are tax free like corporate fund earnings,[36] and both have the advantage of distributing the benefits when the beneficiary is in a lower income tax bracket than he was when he made the contributions.

Another difference between H.R. 10, even after amendment, and corporate plans is in discrimination (discriminatory in giving favored treatment to shareholders, officers, persons who are high in management, and highly paid employees). A corporation may discriminate to a far greater extent than H.R. 10 plans can.[37] Health and accident, wage contribution plans, insurance plans, and death benefits, for instance, do not come under corporate discrimination prohibitions; and those prohibitions against discrimination that do, can be easily avoided in a close corporation. H.R. 10 plans must include all employees with three or more years of continuous service, while a corporate plan has no such limitation.[38] The benefits going to a corporate executive, limited only by the prohibition against discrimination in favor of stockholders, officers, and highly salaried employees,[39] can be far better and more complete in coverage. H.R. 10 plans can not get capital gains treatment for lump sum distributions, estate tax exclusions on death benefits,[40] gift tax exclusions[41] nor the $5000 tax-free death benefit[42] which are all available under corporate plans. Thus, H.R. 10, even in its

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[34] *Id.* § 401.

[35] *Id.* § 404.

[36] *Id.* § 501(a).

[37] *Id.* §§ 401(a), 401(d)(3).

[38] *Id.*

[39] *Id.* § 401(a).

[40] *Id.* §§ 2039(c), 2039(c)(2), 2037, 2038.

[41] *Id.* §§ 2517, 2517(b).

[42] *Id.* §§ 101(b), 101(b)(3). There are other less important differences. H.R. 10 plans vest immediately while it may be possible for corporate plans not to vest at all. Corporate profit sharing plans may take up to 10 years before vesting and 20 years or more for pension plans. When the corporate employee leaves the corporation he receives the percentage of his contribution vested. Contributions for self-employed can't exceed one-third of the total contribution to social security. There is no such restriction for corporate plans. A self-employed cannot borrow from trust plans, cannot buy from or sell to trusts and cannot charge for his services for the trust. Corporate employees can borrow from the trust if adequate security is given and a reasonable interest rate is charged, employees can buy from or sell to trusts if adequate consideration is given, and employees can charge for reasonable value of services to the trust. The trustee for an H.R. 10 plan must be a bank, while corporate plans have no such trustee restrictions. As mentioned before, the distribution of benefits under corporate plans is free from restriction and has much broader limitations on amount of deductions, providing the requirements of *Int. Rev. Code of 1954*. §§ 162, 212 are complied with *See Id.* §§ 404(a)(1), 404(a)(3).

amended form, does not put the self-employed on equal ground with corporate employees.[43]

Before H.R. 10 was amended in 1966, some interesting developments occurred that probably gave some extra incentive to pass the amendment. In 1964, it was held in *Foreman v. United States*[44] that a group of Florida physicians should be allowed corporate status for tax purposes. As in the *Kintner*[45] and *Galt*[46] cases, the organization met all the *Morrissey*[47] requirements except limited liability. Therefore, the court held that the organization's characteristics were substantially those of a corporation.

At this time more and more states were making it possible for professional service corporations to incorporate. This response by states and the current of cases against the I.R.S. caused the Treasury to promulgate a change in the regulations in 1965.[48] The regulations published by the Treasury in 1960, showing its position on professional associations, had as its first example[49] a situation quite similar to the *Kintner* facts except that it set forth a modified form of transferability of interests of its members. The example also had a striking resemblance to the *Galt* factual situation. However, the new regulations deleted this example and added an additional requirement for professional service organizations[50] that made it

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[43] INT. REV. CODE OF 1954, §§ 402(a)(2), 403(a)(2), 403(a)(2)(A).

[44] 232 F. Supp. 134 (S.D. Fla. 1964).

[45] United States v. Kintner, 216 F.2d 418 (9th Cir. 1954).

[46] Galt v. United States, 175 F.Supp. 360 (N.D. Tex. 1959).

[47] Morrissey v. Commissioner, 296 U.S. 344 (1935).

[48] Treas. Reg. § 301.7701-2(h) (1965).

[49] *Id.* § 301.7701-2(g) (1960), Example 1.

[50] On February 2, 1965, Treas. Reg. § 301.7701-2(h) (1965) was added. The following are the parts of 2(h) that the *Empey* court thought pertinent:

> (h) Classification of professional service organizations. (1) (i) A professional service organization is treated as a corporation (or as an association and, therefore, taxable as a corporation) only if it has sufficient corporate characteristics to be classifiable as a corporation under paragraph (a) of this section, rather than as a partnership or proprietorship. For purposes of determining the classification of an organization under these regulations, the term "professional service organization," as used in this paragraph, means an organization formed by one or more persons to engage in a business involving the performance of professional services for profit which under local law, may not be organized and operated in the form of an ordinary business corporation having the usual characteristics of such a corporation. Thus, even if a professional service organization is organized as an ordinary business corporation, this paragraph applies if such corporation is subject to local regulatory rules which deprive such corporation of the usual characteristics of an ordinary business corporation. . . .
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> (2) . . . A business corporation has a continuing identity as an entity which is not dependent upon a shareholder's active participation in any capacity in the production of the income of the corporation. Furthermore, the interest of a shareholder in an ordinary business corporation includes a right to share in the profits of the corporation, and such right is not legally dependent (determined without regard to any agreement among the share-

almost impossible for a professional service organization to qualify for corporate tax treatment. This set the stage for the *Empey* court battle between the Treasury and the professional service organizations.[51]

The judicial challenge of the 1965 regulations by a legal organization in Denver culminated in 1967 in *Empey v. United States.* The district court held for Empey and the Treasury Department appealed to the United States Court of Appeals, Tenth Circuit.[52] In

holders) upon his participation in the production of the corporation's income. However, the interest of a member of a professional service organization generally is inextricably bound to the establishment and continuance of an employment relationship with the organization, and he cannot share in the profits of a professional service organization unless he also shares in the performance of the services rendered by the organization. For purposes of this paragraph, the term "employment relationship" is used to describe such active participation by the member and is not restricted to the common law meaning of such term. If local law, [or] applicable regulations . . . do not permit a member of a professional service organization to share in its profits unless an employment relationship exists between him and the organization, and if in such case, he or his estate is required to dispose of his interest in the organization if the employment relationship terminates, the continuing existence of the organization depends upon the willingness of its remaining members, if any, either to agree, by prior arrangement or at the time of such termination, to acquire his interest or to employ his proposed successor. . . .

. . . .

(5) (i) If the right of a member of a professional service organization to share in its profits is dependent upon the existence of an employment relationship between him and the organization, free transferability of interests within the meaning of paragraph (e) of this section exists only if the member, without the consent of other members, may transfer both the right to share in the profits of the organization and the right to an employment relationship with the organization.

(ii) . . . [I]f the interest of a member of a professional service organization constitutes a right to share in the profits of the organization which is contingent upon and inseparable from the member's continuing employment relationship with the organization, and the transfer of such interest is subject to a right of first refusal, such interest is subject to a power in the other members of the organization to determine not only the individuals whom the organization is to employ, but also who may share with them in the profits of the organization. The possession by other members of the power to determine, in connection with the transfer of the power to determine, in connection with the transfer of such an interest, whom the organization is to employ is so substantial a hindrance upon the free transferability of interests in the organization that such power precludes the existence of a modified form of free transferability of interests. Therefore, if a member of a professional service organization who possesses such an interest may transfer his interest to a qualified person who is not a member of the organization only after having first offered his interest to the other members of the organization at its fair market value, the corporate characteristic of free transferability of interests does not exist.

Many anticipated that the new regulations would not change the court positions already established.

> Few if any new style professional organizations will be able to meet the standards of the 1965 regulations, but since they are "interpretive" rather than "legislative" regulations and were issued long after the statutory provision they interpret, they will probably not weigh very heavily with the flood of litigated cases that can be anticipated.

B. BITTKER & S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 38 (2d ed. 1966) [hereinafter cited as BITTKER].

[51] 272 F.Supp. 851 (D. Colo. 1967).

[52] *See* 81 HARV. L. REV. 1356 (1968) for initial comments.

the 1968 November term, the circuit court affirmed the district court's invalidation of Treas. Reg § 301.7701-2(h).[53]

To provide a background for the *Empey* case, it should be stated that prior to 1962, the Treasury Department prohibited corporate employees from practicing before it; but in that year, the Department amended its requirements concerning those qualified to engage in such practice.[54] The amendment allows professional service corporation employees to carry on their tax practice before the Treasury Department. In response to this amendment and due to the fact that in Colorado lawyers are permitted to incorporate under the General Business Corporation Act,[55] a group of Denver attorneys who specialized in tax matters decided to incorporate.

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[53] 406 F.2d 157 (10th Cir. 1969). A review of the opposing arguments is informative. The Treasury Department argued in *Empey*, as stated in its appellant brief, that *Int. Rev. Code of* 1954, § 7701(a)(2) clearly permits an organization incorporated under state law to be classified as a partnership for federal tax purposes, and that if an organization more closely resembles a partnership than a corporation in its essential and relevant characteristics it must be taxed as a partnership even though it is incorporated under state law. The Treasury further argued that Drexler and Wald Professional Company more closely resembled a partnership since: (1) it did not have free transferability of interests because the stock had to be offered first to the company and if refused permission had to be obtained to sell to an outside lawyer; (2) lacked continuity of life since the state supreme court could cause the corporation to cease being one; (3) lacked limited liability because members were jointly and severally liable; and (4) lacked centralized management in the manner that they actually operated. Finally the Treasury argued that if the regulations were invalid, Drexler and Wald still did not qualify under the 1960 regulations and by the standards stated in *Morissey.*

Ellis J. Sobol, of Drexler and Wald Professional Company, argued in the appellee's brief that the Treasury's 1965 regulations were unreasonable, plainly inconsistent with the statute, and amounted to administrative legislation and thus should be void; and if the 1965 regulations were not void, the professional company still possessed the attributes of corporate resemblance as set forth in the regulations and the decided cases. The amicus curiae brief filed by the Colorado Bar Association argued that corporations validly chartered under state law are included in the term "corporation" as used in the *Int. Rev. Code of 1954,* § 7701(a)(3), and are excluded from the term "partnership" as used in *Int. Rev. Code of 1954,* § 7701(a)(2); that the resemblance test had no application to corporations that were incorporated under state statutes since they inevitably resemble corporations more than partnerships; that if the 1960 regulations were applicable, Drexler and Wald would qualify to be taxed as a corporation since it has more corporate than partnership characteristics; and finally, that Treas. Reg. § 301.7701-2(h), which deals with professional service organizations, is an unreasonable and improper interpretation of the statute. (These two briefs should be read together to get *Empey's* full argument, since Drexler and Wald Professional Company and the Colorado Bar Association purposely worked together in order that they wouldn't be redundant.)

[54] Circular No. 230, 1962-2 CUM. BULL. 394, 31 C.F.R. § 10.460 (1959) *amended* Oct. 3, 1962, by CUM. BULL. 394.

[55] Colorado is unique in that it is the only state where lawyers are permitted to incorporate under the General Business Corporation Act by virtue of a rule of the state supreme court. *Supra* note 1. The rule authorizes attorneys to form professional service corporations under the *Colorado Corporation Code.* The pertinent parts of the rule as as viewed by the 10th Circuit are as follows:

> 265. Professional Service Corporations and Joint Stock Companies. Lawyers may form professional service corporations for the practice of law under the Colorado Corporation Code, providing that such corporations are organized and operated in accordance with the provisions of this Rule. The articles of incorporation of such corporations shall contain provisions complying with the following requirements:
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> A. The name of the corporation shall contain the words "professional company" or "professional corporation" or abbreviations thereof . . . .

The new corporation, called Drexler and Wald Professional Company elected officers and began practicing law on November 1, 1962. Its shareholders signed employment contracts, as did its nonshareholder lawyer employees. On the same date each shareholder entered into a stock redemption contract. Cases were usually referred to individual lawyer employees from outside sources. Routine cases were normally handled by the individual to whom they were referred and he would also set the fee to be paid by the client. If the case was not a routine one or involved a major client, the board of directors would decide what lawyer employee would handle the case, and the board would set the fee to be paid by the client.

The Corporation performed all activities in the corporate name. For example, it obtained short term loans in the corporate name, entered into a ten-year lease for offices, had its corporate name put on all stationery, office doors, and had its corporate name listed in Martindale-Hubbell Law Directory.

In August 1963, one of the original stockholders left the corporation and the corporation redeemed his stock. On November 1, 1965, one of the nonstockholder employees, Empey, purchased the 10 percent stock interest that had been redeemed. When Empey filed his 1965 tax return he reported the salary he had received for the first ten months before he purchased the stock and also reported

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B. The corporation shall be organized solely for the purpose of conducting the practice of law only through persons qualified to practice law in the State of Colorado.

C. The corporation may exercise the powers and privileges conferred upon corporations by the laws of Colorado only in furtherance of and subject to its corporate purpose.

D. All shareholders of the corporation shall be persons duly licensed by the Supreme Court of the State of Colorado to practice law in the State of Colorado, and who at all times own their shares in their own right. They shall be individuals who . . . are actively engaged in the practice of law in the offices of the corporation.

E. Provisions shall be made requiring any shareholder who ceases to be eligible to be a shareholder to dispose of all his shares forthwith either to the corporation or to any person having the qualifications described in paragraph D above.

F. The president shall be a shareholder and a director, and to the extent possible all other directors and officers shall be persons having the qualifications described in paragraph D above. . . .

G. The articles of incorporation shall provide and all shareholders of the corporation shall agree (a) that all shareholders of the corporation shall be jointly and severally liable for all acts, errors and omissions of the the employees of the corporation . . . except during periods of time when the corporation shall maintain in good standing lawyers' professional liability insurance which shall meet the following minimum standards:

1. The insurance shall insure the corporation against liability imposed upon the corporation by law for damages resulting from any claim made against the corporation arising out of the performance of professional services for others by attorneys employed by the corporation in their capacities as lawyers.

2. Such policy shall insure the corporation liability imposed upon it by law for damages arising out of the acts, errors and omissions of all non-professional employees.

10 percent of the corporation's income for the two months of 1965 that he held the stock, even though he did not receive this percentage of the corporation's income in any way or form. Empey then filed his claim for refund for the tax difference between the 10 percent of corporate income he reported and his salary that he actually received. After waiting six months with no action from the Commissioner, Empey sued in the Federal District Court for the District of Colorado.

The trial court held that the Treasury regulation which had denied professional corporations corporate tax treatment[56] constituted an inconsistent position with the *Code,* with the previous administrative position, and with previous case law, and was an exercise of a nondelegable legislative function by an administrative agency. The trial court further stated that even if the new regulations were valid, the organization met the requirements and therefore could be taxed as a corporation.[57] As previously stated, the appellate court agreed with the trial court, affirming the decision.[58]

Since the landmark *Empey* decision, there have been other cases in accord with the *Empey* interpretation of the 1965 regulation. A group of physicians in Ohio obtained corporate tax treatment in *O'Neill v. United States.*[59] In that case, the court held that the same regulation considered in *Empey* was an interpretive regulation, not binding upon the court, and invalid. The court stated that the only time that a corporation was not allowed to be taxed as a corporation was when it failed to meet the "business purpose" test.[60] The court found that the physicians had the non-tax business purpose of controlling a sizeable and unwieldy organization.[61] The court cited *Empey* as support for invalidating the new regulation.

In *Kurzner v. United States,*[62] a Florida medical association won in its challenge to the validity of the new regulation. The court held that it was unreasonable, discriminatory, and invalid and cited *Empey* and *O'Neill* in support. In *Holder v. United States,*[63] a group of Georgia physicians had like success challenging the same 1965

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[56] Treas. Reg. § 301.7701-2(h) (1965).

[57] Empey v. United States, 272 F. Supp. 851 (D. Colo. 1967).

[58] 406 F.2d 157 (10th Cir. 1969).

[59] 281 F. Supp. 359 (N.D. Ohio 1968), *aff'd,* P.H. 60,262 (6th Cir. 1969). The Sixth Circuit said that the new regulation declared invalid in *Empey* was invalid only to the extent it failed to follow the state's label of "corporation."

[60] The "business purpose" test requires an organization to have a legitimate business purpose or purposes to incorporate besides obtaining better tax consequences.

[61] O'Neill v. United States, 281 F. Supp. 359, 361 (N.D. Ohio 1968).

[62] 286 F. Supp. 839 (S.D. Fla. 1968), *aff'd* P.H. 60,262 (5th Cir. 1969). The Fifth Circuit based its invalidation of the new regulation on the ground that it was discriminatory, not on the ground that it was inconsistent with the *Code.*

[63] 289 F. Supp. 160 (N.D. Ga. 1968).

regulation. The court reached the same conclusions as in the previously mentioned cases and found that the organization had complied with the proper qualification procedure optional to the taxpayer.[64] It was held in *Wallace v. United States*[65] that the same regulations were unreasonable, discriminatory, and in conflict with the previously decided cases. Thus, the Treasury seems to have lost its battle with professional service organizations under the present statutes. If, however, cases go against the professional service corporations, it will probably be because they failed to incorporate with full knowledge and understanding of the proper procedures to follow and thus failed to "dot all the i's and cross all the t's."

For a professional service organization to qualify for corporate tax treatment after *Empey,* it must incorporate under state incorporation or association law, *substantially* meeting the requirements of having continuity of life, centralized management, transferability of interests, and limited liability. Under *Empey,* it is wise to have articles of association, setting forth a clear agreement of incorporation; the board of directors should meet regularly and minutes of the meetings should be taken; there should be written employment contracts with the employees paid by the corporation; individual clients should pay the corporation; the corporation should pay corporate income taxes; the corporation's property and debts should be in the corporate name; all business forms should be captioned with the corporation's name; and the organization should hold itself out to the public as being a corporation.

Since H.R. 10 has failed to close the gap completely between professional service taxpayers and corporate employees, incorporation might very well provide the equalizer for professional service people. However, incorporation may be the answer for some and not for others; it should not be automatic. It is felt that for most, incorporation is the answer for the self-employed since he has far superior benefits than those offered by H.R. 10.

The first problem that the professional group must face is whether or not it would be ethical to incorporate.[66] On November

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[64] Rev. Proc. 61-11, 1961-1 CUM. BULL. 897, states that Articles of Association, By-Laws, Employment Contracts, a copy of the state professional association incorporation law, and the Profit Sharing Plan, Pension Plan, etc., may be filed with the District Director of Internal Revenue so that a determination of tax treatment can be made.

[65] 22 Am. Fed. Tax R.2d 5880 (D. Ark. 1968).

[66] One leading case where the court refused to permit lawyers to incorporate is *In the Matter of Co-op Law Co.,* 198 N.Y. 479, 92 N.E. 15 (1910). Ellis J. Sobol, stockholder in Drexler and Wald Professional Company and also the attorney who argued Empey's case, disagrees strongly with the position that it is unethical for either a large or small law firm to incorporate. Mr. Sobol contends that reasons for incorporation are limitation of liability, convenient transferability of shares, greater ease in handling a large organization, and to attract and keep qualified employees through retirement plans, and other increased fringe benefits. The weight of decisions and the ABA are on Mr. Sobol's side.

27, 1961, the American Bar Association expressed the view that it would not be unethical to incorporate if the lawyer is (1) still personally responsible to the client and (2) if the client is made personally aware of the restrictions on liability as to the other lawyers in the organization.[67] In states having similar requirements to Colorado's, this would not be a problem since the members are either subject to joint and several liability or must provide a large amount of insurance.

The public image of lawyers and the legal profession might be tarnished should there be a great stampede (there has been none, yet) to incorporate to simply obtain tax benefits.[68] While many may pass this area over lightly, it was not taken lightly by the CPA profession. The Council of the American Institute of Certified Public Accountants was so concerned with the image of their profession and the members in it that it adopted a resolution condemning CPA's for even supporting this type of "tax gimmick."[69]

The ethical problems are not the only things to be considered. Forming the corporation involves the trouble, time, and expense of filing for qualification and approval of health and retirement plans. In addition it may be quite expensive for one member to withdraw as the market for the members share may be quite limited. Even if there is a right to have the organization repurchase the interest, the fair market value or price would probably be small and the cash might not be available. Also, one might have to forfeit his pension-plan rights if he withdraws.

All tax problems are not solved by incorporation. The organization might have to contend with the extremely high personal holding company tax rates.[70] Generally, a personal holding company is one controlled by a limited number of shareholders and receives most of its income from sources specified in the *Code*. Amounts received from personal service contracts are personal holding company income, according to *Code* § 543(a)(7), if "some person other than the corporation has the right to designate (by name or by description) the individual who is to perform the services, or if the individual who is to perform the services is designated (by name or by description) in the ocntract . . . ." Drexler and Wald Professional Company had clients execute a standard form of fee agreement which solved the problem by having the corporation reserve

[67] *ABA Comment on Professional Ethics, Opinion 303, Nov. 27, 1961*, 48 A.B.A.J. 159 (1962).

[68] Note, *Professional Corporations and Associations*, 75 HARV. L. REV. 776, 789 (1962).

[69] *Editorial: Professional Association or Incorporation*, J. ACCOUNTANCY 39-40 (Nov. 1961).

[70] Note, *supra* note 69 at 791. *See* INT. REV. CODE OF 1954, §§ 542(a), 543(a)(7); § 541 imposes the high personal holding company tax rate.

the right to designate who would perform the services and not having the contract specify who would perform the services.

Another tax problem that the organization might meet is the problem of reasonableness of compensation; compensation must be reasonable in order to qualify as a deduction.[71] To avoid as much double taxation as it possibly can, the organization will attempt to distribute as much of its earnings as it possibly can. Also, a law firm needs only a small cash reserve to operate. Partners of large, well known law firms normally receive greater salaries than can be supported by their billing time to clients. This is not to imply that these partners are not worth what they are paid. These partners surely draw clients to the firm and keep clients simply by their name and reputation. Also, they fulfill administrative duties and other services that cannot be billed to clients. Their name and reputation may allow the organization to charge higher fees. The Commissioner might label some of these attributes *good will*, and good will, if purchased, must be capitalized[72] and is not subject to depreciation or amortization. Upon liquidation, the Commissioner could claim an additional value for good will.

Concurrent with the problem of the Treasury arguing that some salaries are unreasonable is the problem with the assignment of income theory.[73] The Treasury may attempt to attribute income received by the corporation to the stockholder-employee who earned it. The fact that he did not receive such income makes no difference.

If a legal corporation accumulates earnings for a reserve for redemption of any withdrawing member's stock, that accumulation may be subject to the accumulated earnings tax[74] (an unsettled point at this time). Unlike physicians and dentists, who could argue that the reserve is needed for purchase of new or more equipment, lawyers have little reason for such a large accumulation. It can be argued that the business purpose for keeping a large amount of accumulated earnings is in fact the constant, real threat or pos-

[71] INT. REV. CODE OF 1954, § 162(a)(1).

[72] Welch v. Helvering, 290 U.S. 111, 113 (1933).

[73] *See* Lucas v. Earl, 281 U.S. 111 (1930); Victor Borge, 23 Am. Fed. Tax R.2d § 69-320 (2nd Cir. 1968).

[74] INT. REV. CODE OF 1954, § 531-37. The accumulated earnings tax on a corporation's "accumulated taxable income" is at the rate of 27½ percent of the first $100,000 of accumulated taxable income and 38½ percent of any accumulated taxable income in excess of $100,000. This tax is in addition to the usual corporate tax and is aimed at preventing corporations from accumulating income so that stockholders won't be taxed on dividends. *Int. Rev. Code of 1954*, § 535(c) allows an accumulated earnings credit in "an amount equal to such part of the earnings and profits for the taxable year as are retained for the reasonable needs of the business." Section 535(c)(2) says the credit allowed to accumulation "shall in no case be less than the amount by which $100,000 exceeds the accumulated earnings and profits of the corporation at the close of the preceding taxable year." Thus the first $100,000 accumulated won't be subject to the accumulated earnings tax.

sibility that one or more members will withdraw from the organization. Many of the smaller firms that would incorporate may not have to worry about the accumulated earnings tax, since they would not need to accumulate earnings in excess of $100,000, and probably could not if they wanted to. Large and small professional service corporations can also argue that it is reasonable to accumulate earnings to buy an outside business for investment purposes, and could point out that office equipment and furnishings are not cheap and replacements will not be any cheaper.

If a small professional service organization decides to elect under Subchapter S,[75] it will throw itself into a not impossible situation, but a somewhat complicated one. This maze of *Code* and regulations has been tried before by professional service people and has not been found to be very practical.[76] However, it is not as complicated as one might at first think and this election could be an answer to accumulated income and personal holding company problems.

If a sole practitioner decides to incorporate and be a one-man corporation he will have problems of qualification.[77] The *Code*,[78] regulations,[79] and *Morrissey* lean toward requiring more than one person in an "association."[80] The main problem with a one-man association is continuity of life,[81] but *Empey* said that if *incorporated* under state law, continuity of life would not be a problem. The real problem areas are (a) centralized management, (b) assignment of income, and (c) personal holding company treatment if Subchapter S is not elected.[82]

In conclusion, before a professional service organization decides to incorporate it should weigh carefully all the advantages and disadvantages, as well as the ethical problems.

H.R. 10 is a pale substitute for a corporate plan. Incorporation

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[75] *Id.* §§ 1371-77.

[76] *See* Greene, *Practitioners' Experiences with Subchapter S Reveal Many Doubts, Fears; Use Is Limited,* 10 J. TAXATION 130 (1959).

[77] *See* BITTKER, *supra* note 50, at 39.

[78] INT. REV. CODE OF 1954, § 7701(a)(3).

[79] Treas. Reg. § 301.7701-2(a)(2) (1965).

[80] *But see* Lombard Trustees, Ltd. v. Commissioner, 136 F.2d 22 (9th Cir. 1943).

[81] A.A. Lewis & Co. v. Commissioner, 301 U.S. 385 (1937).

[82] There also may be problems in incorporating a cash basis partnership, as shown in *Peter Raich,* 46 T.C. 604 (1966). In this case petitioner tried to fall within the provisions of *Int. Rev. Code of 1954,* § 351 by incorporating with a tax free exchange of his property for stock in the new corporation. Petitioner ran afoul of statute when he received stock *plus* an unsecured promissory note. The court found that the corporation assumed liabilities over the petitioner's adjusted basis of property transferred. Thusly, *Code* § 357(c) was applicable via *Code* § 351(d)(1) and petitioner should be taxed on this excess of liabilities assumed. The court also found that the petitioner should be taxed on the amount of the note received since it was within the meaning of "other property" received besides stock under *Code* § 351(b).

for most professional service taxpayers is the best answer now available. There are professional service people who are now being pushed too quickly and are being ill advised by mutual funds and insurance groups (who are the ones who stand to benefit from the corporate form through retirement plans). Incorporation must take place only after careful investigation and planning. The best answer would be federal legislation that would put self-employed and corporate employees on equal footing and thus end the journey into the unknown regions and pitfalls of professional service people incorporating. This legislation appears to be only a wish as it is fairly safe to say that chances for equalization by legislation are nill.[83]

T. Michael Carrington

CRIMINAL PROCEDURE — BIFURCATED TRIAL — THE RIGHT TO SEPARATE TRIALS ON THE ISSUES OF GUILT AND PUNISHMENT — *People ex rel. McKevitt v. District Court,* 447 P.2d 205 (Colo. 1968).

CLARENCE English was charged, by direct information, with the crime of murder in the first degree. The public defender submitted a "Motion for Bifurcated Trial" on behalf of English, requesting separate trials before separate juries on the issues of guilt and of punishment. The Denver District Court ordered *separate* trials on the issues of guilt and punishment but before the *same* jury. Thereafter, on behalf of the People, the district attorney instituted an original proceeding on a writ of prohibition against the district court and against the judge who issued the order alleging that the Colorado statute concerning trials for murder in the first degree[1] had been misinterpreted.[2] The Supreme Court of Colorado, after issuing to the district court a rule to show cause, *held* the rule absolute and directed the trial court to reverse its order that English be given separate trials before the same jury. The language used

[83] The Commissioner of Internal Revenue, Randolph W. Thrower, has indicated that the I.R.S. might attack professional service corporations through the administration's legislative tax proposals. These proposals could be to force all Subchapter S Corporations to use "Keogh" or H.R. 10 plans rather than corporate plans. *See* P.H. FED. TAX REPORT BULLETIN § 60,293-94.

[1] COLO. REV. STAT. ANN. § 40-2-3(1) (1963) provides:

> The jury before which any person indicted for murder shall be tried, shall, if it find such person guilty thereof, designate by its verdict whether it be murder of the first or second degree, and if murder of the first degree, the jury shall *in its verdict* fix the penalty to be suffered by the person so convicted, either at imprisonment for life at hard labor in the penitentiary, or at death; and the court shall thereupon give sentence accordingly (emphasis added).

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by the statute "clearly negates the concept of separate verdicts resulting from separate trials on the issues of guilt and punishment, regardless of whether the separate trials be before the same or different juries."[3]

This Comment addresses itself to an analysis of the Colorado Supreme Court's decision in *People ex rel. McKevitt v. District Court* in light of the arguments surrounding (1) the power of a judge to order a split trial on the issues of guilt and punishment, (2) the defendant's constitutional right to allocution, and (3) the constitutional impact of the equal protection and self-incrimination questions, with a view toward legislative amendment of the present procedure.

I. THE JUDGE'S POWER TO ORDER THE TRIAL TO BE DIVIDED INTO TWO STAGES

The brief for the intervenor, Clarence R. English, represented by the public defender, sets forth as its main contention that a trial judge has the power to order a two-step trial in a capital case.[4] As precedents for this contention, the brief cites the cases of *United States v. Curry*,[5] and *State v. Raskin*.[6] In *Curry*, the Court of Appeals for the Second Circuit stated:

> [T]he unitary trial can be highly unsatisfactory. The most serious problem arises when the trial judge is compelled either to exclude evidence relevant to an intelligent disposition of the sentence in question, or to admit such evidence knowing that the trial of guilt is thereby open to matters prejudicial and otherwise inadmissible. . . .
>
> Since the unitary trial possesses these fundamental problems, we do not interpret the silence of Congress on this question as precluding the trial judge from confining the first presentation to the jury to the issue of guilt when the defendant's right to a fair trial would be jeopardized by a unitary trial.[7]

The *Curry* case involved a federal homicide statute which states in part that: "Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment' in which event he shall be sentenced

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[3] *Id.* at 206.

[4] Brief for Intervenor at 5, People *ex rel.* McKevitt v. District Court, 447 P.2d 205 (Colo. 1968). *See generally* 1 WIGMORE, *Evidence* § 194(b) (1940). Professor Wigmore lends some support to this view when he states:

> The only way to avoid injustice in such cases is to reserve the evidence of former convictions until after a finding of guilt on the evidence in a particular case . . . . It is to be regretted that the Supreme Court of Pennsylvania did not handle the verdict procedure flexibly, and introduce this method without waiting for legislative authority. (Our Courts are too prone to wait for legislative interference before altering their procedure, which ought to be exclusively within their own control.)

[5] 358 F.2d 904 (2d Cir. 1965), *rehearing denied* 387 U.S. 949 (1967), 392 U.S. 917 (1968).

[6] 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

[7] 358 F.2d 904, 914 (2d Cir. 1965).

to imprisonment for life . . . ."[8] Although the Colorado and federal statutes are similar in their effect, intervenor's citing of the *Curry* case in support of the judge's power to order split trials is somewhat misleading. The portion of the opinion quoted *supra* is essentially dictum, since the appellate court held that the trial judge did not abuse his discretion in conducting a unitary trial. The court continued:

> [W]e think it unwise to *require* the two-stage trial in every case under § 2113(e) [allowing the jury in a felony murder case to decide if the defendant should suffer the death penalty] and related statutes. . . . Moreover, it has been suggested that the two-stage trial does not always work to the defendant's advantage, and we are loath to compel unwilling defendants to submit to a procedure which is devised for their benefit but which may be prejudicial in its application to a particular case.[9]

This decision lends *some* weight to the proposition that the trial judge *may* order split trials when he deems it unfair not to do so. However, the fact that the opinion concerns a statute permitting a trial judge to order, in his discretion, a bifurcated trial, and the fact that the portion of that opinion concerned with the bifurcation question is dictum, leads to the conclusion that such a statute must be in effect before judicial discretion can be asserted.

Intervenor's second major argument for the inherent judicial power to order split trials rests on analogy. The brief states: "In a somewhat different context to a murder case but involving the precise principle applicable herein, the *power* of a trial court to so control the order of proof as to have presented sequentially to the jury the question of guilt first and then, if necessary, another collateral issue has been clearly recognized."[10] As authority in support of this contention, intervenor's brief cites *State v. Raskin.* However, the facts in *Raskin* differ on one important point from those in *McKevitt;* in the former, the question of a bifurcated trial ensued from a motion to separate the issues of *insanity* from guilt, while in *McKevitt,* insanity was not at issue.

The brief of the intervenor analogizes that since bifurcated trials have been established on the question of insanity in capital cases, they should also be established on the issues of guilt and punishment in capital cases where "the unfairness is greater . . . ."[12] Thus, a person who makes no insanity plea should have two separate trials — the first on the issue of his guilt and, if he is found guilty, the

[8] 18 U.S.C. § 111(b) (1964).

[9] 358 F.2d 904, 914 (2d Cir. 1965) (footnote omitted).

[10] Brief for Intervenor at 9, 447 P.2d 205 (Colo. 1968).

[11] 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

[12] Brief for Intervenor at 11, 447 P.2d 205 (Colo. 1968).

second on the issue of punishment. It can be inferred from this line of reasoning that a person who makes an insanity plea should have three trials — the first on the issue of his mental soundness (was he mentally capable of committing the act?), the second on the issue of his guilt (did he commit the act?), and the third on the issue of his punishment.

In the *Raskin* case the issue was whether inculpatory statements made during a *compulsory* medical examination could be used in a trial on the issue of guilt. The court found that they could not, but that such statements could be used in a trial on the issue of insanity.[13] The analogy to the circumstance of Clarence English, where defendant sought to *voluntarily* present evidence of mitigation in the trial on punishment, is not conclusive. First, the compulsory nature of defendant's testimony is not present, as in *Raskin,* and second, the Colorado Supreme Court has already held that evidence for mitigation purposes *may* be presented by testimony in a unitary trial.[14] While the *Raskin* case is somewhat analogous to *McKevitt,* such differences as have been previously delineated make it not dispositive of the question of a trial judge's inherent power to order a bifurcated trial.

Probably the strongest argument advanced against the power of the trial judge to split the trial is found in the brief of the petitioner-district attorney, which argument was adopted by the Colorado Supreme Court:

> Petitioner has found no statutory or case authority in the State of Colorado for the use of the two-step trial. Rather, we find the language which is found in Colo. Rev. Stat. Ann. § 40-2-3(1) (1963) to be most compelling. . . .[15]
>
> . . . The Court will note with care that the language of the statute clearly indicates that the *same* verdict is to be used for [sic] to indicate the penalty imposed as is used to find the defendant guilty of murder in the first degree. . . .
>
> In conclusion, we feel that the order of the trial judge neither accomplishes what the Defendant sought by his motion nor accords to the People the opportunity to present its case in the manner which has long been a matter of tradition in this State and which has long received judicial approval. We would submit that the proper forum for a change of procedure would be the General Assembly which has the authority to institute such change.[16]

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[13] 34 Wis. 2d 607, 624, 150 N.W.2d 318, 328 (1967).

[14] Segura v. People, 431 P.2d 768, 769-70 (Colo. 1967). The court stated:
> Admittedly the Colorado statute requires the defendant to choose whether he will take the stand himself in an attempt to mitigate the crime, or to decline to testify. There is nothing in the statute which prevents the introduction of relevant evidence to establish mitigating circumstances. Such circumstances can be shown by witnesses other than the defendant.

[15] COLO. REV. STAT. ANN. § 40-2-3(1) (1963).

[16] Memorandum Brief in Support of Complaint for Writ of Prohibition at 3-4, 447 P.2d 205 (Colo. 1968).

II. THE RIGHT TO ALLOCUTION

Allocution refers historically to the procedure by which the judge asks the defendant who has been found guilty why sentence should not be imposed. The defendant may then provide information toward possible mitigation of punishment, which the judge may take into account when imposing sentence. Statutes in many states have codified the common law requirement of allocution.[17] Colorado statutes provide for allocution in noncapital cases.[18]

The Colorado Supreme Court, in the McKevitt opinion, considered the question of a constitutional right to allocution. The existence of such a right was denied by citing the decision of the United States Court of Appeals for the 10th Circuit in *Segura v. Patterson* that "the right to a pre-sentence report or other means of allocution has not risen to the dignity of a constitutional requirement. . . ."[19]

Thus, while it may be desirable at times to allow the defendant to speak for himself in mitigation of the crime of which he has been convicted, it has been held that omission of allocution is not a ground for reversal.[20] The United States Supreme Court has even held that noncompliance with the requirement of allocution in the Federal Rules of Criminal Procedure[21] is not an error of constitutional magnitude.[22] The right to have a bifurcated trial, therefore, cannot be predicated on a constitutional right to allocution.

III. THE CONSTITUTIONAL ARGUMENTS

If there is no constitutional right to allocution, is there nonetheless a violation of basic constitutional rights inherent in the Colorado unitary trial procedure? Attorney for intervenor argued that there was such a violation,[23] citing the Colorado statute allowing a presentence investigation of defendant's background in

[17] For a general treatment of the right to allocution, see: Annot., 96 A.L.R.2d 1292; for an historical treatment of bifurcation see: Besharou and Mueller, *Bifurcation: The Two Phase System of Criminal Procedure in the United States*, 15 WAYNE L. REV. 613 (1969).

[18] COLO. REV. STAT. ANN. § 39-7-8 (1963).

[19] 402 F.2d 249, 252 (10th Cir. 1968) (footnote omitted).

[20] Ball v. United States, 140 U.S. 118 (1891), citing the rule but recognizing opposing authority.

[21] FED. R. CRIM. P. 32(a), which provides:

> (a) Sentence
>
> (1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

[22] Hill v. United States, 368 U.S. 424 (1962).

[23] Brief for Intervenor at 21, 447 P.2d 205 (Colo. 1968).

cases where the court has discretion as to the penalty to be inflicted.[24] Another Colorado statute pertinent to the question of equal protection but not cited by intervenor relates to applications for probation.[25] Both statutes provide for a report prepared by a probation officer concerning the background of defendant, his prior criminal record, his characteristics, his financial condition, and such information about his behavior as would be helpful in imposing sentence. Neither statute applies to a charge of murder in the first degree where the defendant pleads not guilty, because in such a case the court has no discretion as to penalty, and probation may not be granted.[27] Hence, there exists the incongruous situation that in all crimes except murder in the first degree there is afforded to the sentencing authority an opportunity to receive evidence in allocution. In a first degree murder case, however, where the penalty is potentially the most severe and the issue of penalty is closely related to the issue of guilt, no such presentencing procedure is provided. Certainly the incongruity of such a situation is a strong argument for its revision. However, the question remains: Is such an incongruity a denial of equal protection of the laws?

One argument asserting such a denial is that since a person who pleads guilty to a charge of first degree murder may receive a presentence hearing under the Colorado statute,[28] while a person

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[24] COLO. REV. STAT. ANN. § 39-16-2 (1963).

> Presentence investigation. — Whenever any person shall be adjudged guilty of any felony, where the court has discretion as to the penalty, the court, before the imposition of sentence, shall cause a probation officer to make an investigation of the background of such person including any prior criminal record and such information about his characteristics, his financial conditions and circumstances affecting his behavior as may be helpful in imposing sentence and such other information as may be required by the court, in order that the court may be fully informed concerning said person. The probation officer, after completing said investigation, shall make a written report to the court.

[25] *Id.* at § 39-16-3.

> Application — deferment — ineligibles. — Any person after conviction of a felony or misdemeanor, or after a plea of guilty to a felony or misdemeanor, except murder of the first or second degree, may make application to the court to be released on probation. Whenever such application is made, the court shall defer sentence and cause a probation officer to make an investigation of the background of the applicant including any prior criminal record of the defendant and such information about his characteristics, his financial condition and circumstances affecting his behavior as may be helpful in determining the advisability of granting probation and such other information as may be required by the court, and of the facts of the offense of said applicant. The probation officer within such time as the court may prescribe shall make a written report to the court of said investigation, together with his recommendation as to whether or not probation should be granted. A person, having been twice convicted of a felony in this state or elsewhere prior to the case on which his application for probation is based, shall not be eligible for probation.

[26] *Id.* at § 40-2-3(1).

[27] *Id.* § 39-16-3.

[28] *Id.* §§ 39-16-2, 39-16-3.

who pleads not guilty receives no opportunity for allocution,[29] there is a denial of equal protection of the laws. In support of this contention, intervenor's brief cites the case of *United States v. Jackson*.[30] In that case, defendant was charged with a violation of the Federal Kidnaping Act which provides that interstate kidnapers shall be punished: "(1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment by any term of years or for life, if the death penalty is not imposed."[31] Thus, a person charged under the Act could plead guilty (waiving a jury trial) and be assured of not having the death penalty imposed. However, if he pled not guilty, thereby asserting his right to a jury trial, he would incur the possibility of the death sentence. The United States Supreme Court held that the clause authorizing capital punishment was invalid as imposing an impermissible burden upon the accused's exercise of his fifth amendment right to not plead guilty and his sixth amendment right to demand a trial by jury, but upheld the remaining clauses of the statute.[32]

The *Jackson* decision presents an interesting question of whether the Colorado procedure is a violation of an accused's fifth and sixth amendment rights. On the surface, the defendant in a murder trial in Colorado is presented with a dilemma similar to the defendant in *Jackson*. Under the Colorado statute, the accused must choose between foregoing the benefits of a presentence hearing by pleading not guilty and thereby running the risk of a greater penalty; before *Jackson*, the accused was faced with a similar risk by pleading not guilty to the kidnaping charge and possibly being sentenced to death. In summary, by analogizing the Colorado procedure to that of the Federal Kidnaping Act, it would appear that since the former is, the latter may be, violative of an accused's constitutional rights.

Unfortunately, however, the issue of constitutionality in *McKevitt* was not framed in the same context as in *Jackson*. In *McKevitt*, the constitutional issue was limited to the question of a bifurcated trial. The United States Supreme Court, in *Jackson*, expressly denied the government's contention that a second trial on the issue of penalty could ensue in kidnaping cases. It said: "Thus, when such a jury has been convened, the statutory reference is to that jury alone, not to a jury impaneled after conviction for the limited purpose of

[29] *Id.* at § 39-16-2.

[30] 390 U.S. 570 (1968).

[31] 18 U.S.C. § 1201(a) (1964).

[32] United States v. Jackson, 390 U.S. 570, 572 (1968).

determining punishment."[33] The effect of this reasoning is that, although the portion of the Federal Kidnaping Act relating to the death penalty is violative of the Constitution, the bifurcation issue is separate, and bifurcated trials were specifically excluded from the meaning of the federal statute by the Court's holding in *Jackson.*[34]

Considering the manner in which the bifurcation issue was raised in *McKevitt,* and also the Colorado statutory pronouncement denying bifurcation, it is probable that the constitutional questions concerning the Colorado procedure for imposing the death penalty were not controlled by the *Jackson* decision. To have ruled on such questions, the Colorado court would have had to exceed the bounds of the issues presented by the case before it.

The accused under the Colorado procedure is confronted with an additional dilemma having possible constitutional ramifications. The defendant in a unitary trial must choose between presenting mitigating evidence to the jury on the issue of punishment, or maintaining his privilege against self-incrimination on the issue of guilt. However, the courts have not found this dilemma to be of constitutional status. The Colorado Supreme Court in *Segura v. People* stated:

> Admittedly the Colorado statute requires the defendant to choose between taking the stand himself in an attempt to mitigate the crime, or declining to testify. There is nothing in the statute which prevents the introduction of relevant evidence to establish mitigating circumstances. . . . We know of no jurisdiction in which it has been held that this practice [unitary trials] purports to deny constitutional rights.[35]

The Court of Appeals for the 10th Circuit likewise found that:

> It is always the case that in exercising the constitutional right to remain silent, the individual is forced to forego his opportunity to personally appeal to the jury. Whether such an appeal relates to the determination of guilt or punishment or both, it cannot be denied that the inducement not to remain silent and thus to forego a specific constitutional right does not arise from any unnecessary burden imposed by the State. We conclude that the

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[33] *Id.* at 577 (footnote omitted).

[34] The Court in *Jackson* went on to say:

> The Government would have us give the statute this strangely bifurcated meaning without the slightest indication that Congress contemplated any such scheme. Not a word in the legislative history so much as hints that a conviction by a court sitting without a jury might be followed by a separate sentencing proceeding before a penalty jury.
>
> It is one thing to fill a minor gap in a statute — to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Id. at 578-80.

[35] 431 P.2d 768, 769-70 (Colo. 1967).

> single-verdict procedure does not "needlessly chill the exercise of basic constitutional rights."[36]

The Supreme Court of the United States has also ruled on the constitutionality of split trials:

> To say that the two-stage jury trial . . . is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.[37]

While the Court did not address itself directly to the self-incrimination issue in this case, it can be inferred that notions of due process do not compel a split trial to preserve the right against self-incrimination.

Thus, there is authority, as represented by the aforementioned cases, for the proposition that the unitary trial system is not violative of the constitutional rights protecting a defendant in a criminal trial against compulsory self-incrimination.

IV. Legislative Pronouncements on the Bifurcation Issue

As the Court in *Spencer* intimated, although the unitary trial system is not unconstitutional, the bifurcated trial system may well be more equitable.[38] Since courts seem to be reluctant to change the unitary trial procedure to the bifurcated procedure, any modifications must come from the legislature in the tradition of judicial deference to that body.

Four states have already taken this step through legislative enactments. California,[39] Connecticut,[40] New York,[41] and Pennsylvania[42] have enacted bifurcated trial procedures for first degree murder cases. The California statute is representative:

> The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any

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[36] Segura v. Patterson, 402 F.2d 249, 253 (10th Cir. 1968) (footnote omitted).

[37] Spencer v. Texas, 385 U.S. 554, 567-68 (1967) (footnote omitted).

[38] Even the Colorado Court in *Segura* acknowledged this fact when it said: "It may well be that a better method of determining punishment could be devised [other than the unitary system]."

[39] Cal. Penal Code § 190.1 (West 1959).

[40] Conn. Gen. Stat. Ann. § 53-10 (Supp. 1963).

[41] N.Y. Penal Law § 1045-a(2) (McKinney 1967).

[42] Pa. Stat. tit. 18, § 4701 (1963).

> plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. *Evidence may be presented at the further proceedings on the issue of penalty,* of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty.[43]

The Model Penal Code also provides for a two-step trial in its recommendations for the sentencing procedure in murder cases.[44]

Some examples of admissible evidence at California penalty trials are: prior acts of misconduct; [45] comments by prosecution of defendant's recidivist character;[46] wife's testimony as to defendant's violent acts;[47] and the fact that murder victims were innocent children.[48] Examples of inadmissible evidence in California at the penalty trial are: confession tapes including mention of prior

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[43] CAL. PENAL CODE § 190-1 (West 1959) (emphasis added).

[44] MODEL PENAL CODE § 210.6(2) (1962 Draft).

> (2) *Determination by Court and Jury.*
> Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.
>
> In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.
>
> The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

[45] People v. Tahl, 65 Cal. 2d 719, 423 P.2d 246, 56 Cal. Rptr. 38 (1967).

[46] People v. Talbot, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966).

[47] People v. Mathis, 63 Cal. 2d 416, 406 P.2d 65, 46 Cal. Rptr. 785 (1965).

[48] People v. Modesto, 59 Cal. 2d. 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963).

crimes;[49] photographs of deceased where defendant admitted crime;[50] evidence of prosecution's willingness to plea bargain and defendant's unwillingness.[51]

The limits of admissible evidence at the penalty trial are not boundless. The rules of evidence are not relaxed because the second trial is solely on the issue of penalty, but many of the same questions as to admissibility at the trial on guilt pertain to the trial on punishment.[52] Accordingly, incompetent[53] or irrelevant[54] evidence can not be introduced at either trial. The test of admissibility is weighing the probative value of the evidence against its inflammatory effect.[55]

Thus, it seems that there is substantial legislative authority for the Colorado legislature to amend its present murder statute to include the bifurcated trial provisions. The public defender in Denver prepared and introduced such a bill in the 47th General Assembly of Colorado.[56]

CONCLUSION

At this point, in view of the zealous efforts to promote the bifurcated trial procedure in Colorado by the public defender and the equally zealous efforts to oppose it by the district attorney, it should be pointed out that the bifurcated trial procedure is a two-way street. While the defense may introduce evidence at the trial on punishment in mitigation of the offense, the prosecution may introduce counterbalancing evidence in aggravation. In California, the evi-

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[49] People v. Hines, 61 Cal. 2d 164, 390 P.2d 398, 37 Cal. Rptr. 622 (1964).

[50] *Id.*

[51] People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (1964).

[52] Handler, *Background Evidence in Murder Cases,* 51 J. CRIM. L.C. & P.S. 317, 326 (1960).

[53] People v. Purvis, 52 Cal. 2d 871, 346 P.2d 22 (1959).

[54] People v. Hill, 66 Cal. 2d 536, 426 P.2d 908, 58 Cal. Rptr. 340 (1967).

[55] *See* Handler, *supra* note 52 at 325.

[56] S. 318, 47th General Assembly of Colorado (1969). The substance of the bill, which passed the senate but was not reported out of the House Judiciary Committee, reads:

> Every person charged with first degree murder as defined in this article may petition the court prior to trial for an order that the issue of guilt and the issue of penalty shall be tried separately because prejudice may otherwise ensue to the defendant. If the court shall find that one trial on both issues may be prejudicial to the defendant he shall then order that the guilt or innocence of the person charged with first degree murder shall first be determined without his finding as to penalty. If such person shall be found guilty of first degree murder then there shall thereupon be further proceedings before the court or the same jury on the issue of penalty. Evidence may be presented at the further proceeding on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented and the penalty fixed shall be expressly stated in the decision or verdict.

dence in aggravation is even permitted to the introduction of prior crimes not admissible in the trial on the issue of guilt.[57] Hence, it would appear that both prosecution and defense attorneys would favor the bifurcated procedure.

Having determined that the bifurcated trial procedure is precluded by the present Colorado statute, and that the unitary procedure is not constitutionally violative, it is apparent that the *McKevitt* decision is proper within these guidelines. Nevertheless, the bifurcated procedure, having advantages for both the prosecution and the defense sides, seems to be more equitable. Normally inadmissible evidence or evidence withheld from admission because of its privileged nature is admissible in the second portion of the bifurcated proceeding. Such admission is proper since the jury in a murder case is permitted to hear evidence concerning bad character of the defendant as well as his good character. Where relevant, both types of evidence should be presented to the jury so that their sentence may be deemed more just and proper. The legislative bill proposed by the Denver public defender would be the realization of this procedure and should be given serious consideration.

Richard F. Mauro

[57] People v. Tahl, 65 Cal. 2d 719, 423 P.2d 246, 56 Cal. Rptr. 318 (1967). The court in interpreting CAL. PENAL CODE § 190.1 (West 1959) upheld the view that prior acts of misconduct by a defendant at a penalty trial are admissible even if he has never been prosecuted for them.

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